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5819.

# REPORTS OF CASES

DECIDED IN THE

## COURT OF APPEAL.

DURING THE YEAR 1900.

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EDITOR:

J. F. SMITH, Q.C.

REPORTER:

R. S. CASSELS.

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VOLUME XXVII.

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JUDGES  
OF THE  
COURT OF APPEAL

DURING THE PERIOD OF THESE REPORTS.

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THE HON. SIR GEORGE WILLIAM BURTON, C.J.O.

“ “ JOHN DOUGLAS ARMOUR, C.J.O.

“ “ FEATHERSTON OSLER, J.A.

“ “ JAMES MACLENNAN, J.A.

“ “ CHARLES MOSS, J.A.

“ “ JAMES FREDERICK LISTER, J.A.

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*Attorney-General:*

THE HON. JOHN MORISON GIBSON.

### MEMORANDUM.

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On the 2nd July, 1900, the Honourable Sir<sup>7</sup><sub>Geo</sub> GEORGE WILLIAM BURTON resigned his office of Chief Justice of Ontario, and on the same day the Honourable JOHN DOUGLAS ARMOUR, Chief Justice of the Queen's Bench, was appointed Chief Justice of Ontario.



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# ONTARIO APPEAL REPORTS.

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HAVEN v. HUGHES.

*Contract—Mineral Rights—Right to Possession.*

By an agreement made on the 13th of January, 1897, in consideration of one dollar, the owner of certain lands agreed "to lease and hereby does lease to (the plaintiff) the following described premises," mentioning them, and "hereby leases and agrees to give and convey hereby to said (plaintiff) all mineral rights on said premises, the right to quarry stone and the right to bore for gas, with privilege to erect and bring on to said premises all necessary tools, machinery and conveniences for mining, quarrying and boring on said premises, and to erect buildings thereon for said tools and machinery and for housing employees, and also to drain said premises and to build necessary railroad thereon."

"Said (plaintiff) also agrees if he uses said property under this agreement to take therefrom the amount of 50,000 cords of stone, and to pay therefor the sum of 25 cents per cord per United States specifications. Said (owner) hereby agrees that he will give no other party or corporation any rights on said premises for the above described purposes on or before August 1st, 1897."

"Unless said (plaintiff) utilizes said premises for said purposes on or before August 1st, 1897, this lease shall be null and void :"—

*Held*, affirming the judgment of BOYD, C., that under this agreement the plaintiff was not entitled to exclusive possession of the land, or to quarry all the stone thereon, but only to quarry 50,000 cords.

APPEAL by the plaintiff from the judgment at the trial. Statement.

The following statement of the facts is taken from the judgment of MACLENNAN, J. A. :—

The relief sought by the plaintiff in his statement of claim is an injunction to restrain the defendants from trespassing upon or disturbing the plaintiff in the enjoyment and possession of certain lands; also to restrain them from quarrying or removing stone therefrom, and for an order to compel them to remove from the land the plant and machinery used by them in working the quarries. Damages for trespass are also asked for.



Statement. The action was commenced on the 29th of January, 1897, and is founded on an instrument in writing made between the plaintiff and the defendant Peter B. Troup, in the following terms:

"This agreement, made this 13th day of January, 1897, between Peter B. Troup, of the Township of Bertie, County of Welland, and Province of Ontario, Canada, and William R. Haven, of the City of Buffalo, County of Erie, and State of New York, witnesseth that for and in consideration of the sum of one dollar said Troup hereby agrees to lease and hereby does lease to said Haven the following described premises, viz., lot number 14, concession one (1), Lake Erie, in the said Township of Bertie. The said Troup hereby leases and agrees to give and convey hereby to said Haven all mineral rights on said premises, the right to quarry stone and the right to bore for gas, with privilege to erect and bring on to said premises all necessary tools, machinery, and conveniences for mining, quarrying, and boring on said premises, and to erect buildings thereon for said tools and machinery, and for housing employees, and also to drain said premises and to build necessary railroad thereon.

Said Haven also agrees if he uses said property under this agreement to take therefrom the amount of 50,000 cords of stone, and to pay therefor the sum of 25 cents per cord per United States specifications. Said Troup hereby agrees that he will give no other party or corporation any rights on said premises for the above described purposes on or before August 1st, 1897.

Unless said Haven utilizes said premises for said purposes on or before August 1st, 1897, this lease shall be null and void.

Said parties hereby agree that in case any extraordinary damage cannot be settled between said Troup and Haven, that the same shall be settled and adjusted by and among three arbitrators or adjusters, who shall be appointed one each by the parties hereto, and they, the appointees, shall appoint the third."

In his statement of claim the plaintiff alleges that by virtue of that instrument he became and was at the commencement of the action entitled to the exclusive and uninterrupted possession of the land therein mentioned; and that it granted and conveyed to him all mineral rights on the land, and especially the exclusive right to quarry stone and to bore for gas thereon, and to take away and dispose of all the stone as he might think fit. Statement.

Before the plaintiff had made any entry upon the land, Troup had, on the 23rd of March, made an agreement in writing with the other defendants for the sale to them of that part of the land comprised in the agreement of the 13th of January, lying to the south of the Grand Trunk Railway, that is, of about seventy-five acres, retaining the remainder which lay north of the railway, consisting of about ten acres. That contract was followed on the 29th of March, by a conveyance of the seventy-five acres in the usual form, free from incumbrances, in consideration of the sum of \$6,500. The only reference to the instrument of the 13th of January contained in these deeds was in the agreement of the 23rd of March, which declared that the conveyance was to be taken subject thereto. Soon after obtaining this conveyance the purchasers went into possession and commenced to open quarries, and to take out and carry away stone, for use in a large contract which they were performing in or near the city of Buffalo. When the plaintiff became aware of these operations he commenced the present action, and on the following day served upon the defendants, other than Troup, a written notice of the instrument of the 13th of January, claiming to be solely entitled to all mineral rights upon the land, and to quarry stone thereon; and also intimating his intention of complying with the terms of, and exercising all his rights under, that instrument. Afterwards, on the 22nd or 23rd of July, the plaintiff entered upon that part of the land south of the railway, and quarried about 100 cords of stone, which, however, he has never removed.

By the original defence and counterclaim, the defen-

Statement. dants pleaded that the true agreement between the parties was not expressed by the writing, and they claimed to have it reformed and submitted to be bound by it as so reformed. This defence was by leave of the Court afterwards withdrawn, and a new statement of defence was filed, setting forth the circumstances under which the instrument was signed, that it did not express the true agreement, and ought not to be enforced, but set aside. By paragraph 8 of the defence, the defendants nevertheless submitted to allow the plaintiff to take 50,000 cords of stone from the land, within five years, paying therefor 25 cents per cord, and also to erect for that purpose the necessary plant and machinery, and to bore for natural gas and to use it for power. This offer of the defendants was not accepted.

The action was tried at Toronto on the 23rd of April, 1898, before BOYD, C., who, on the 2nd of May, 1898, gave the following judgment:—

BOYD, C.:—

It is difficult, perhaps impossible, to give a proper legal designation or term of art to the artless document which is at the foundation of the plaintiff's claim. He claims under it as lessee with exclusive right of possession to the lands now owned by the defendants, subject to the instrument, which reads thus:

[The learned Chancellor read it, and continued:]

. It is not under seal, and though the word "lease" is used it lacks the element of certainty of term which is essential to a demise. It is more than a mere personal license, and perhaps amounts to an agreement as to profits *a prendre*, which would give some interest in the soil. But of this I am clear, that it does not import an exclusive interest in the plaintiff so as to disqualify the owner of the land from also working at the deposits of stone, provided he do not prejudice the contemporaneous working of the plaintiff. The indicia of exclusiveness are lacking.

There is no word importing the exclusive user by the plaintiff; he does not engage himself to take more than fifty thousand cords of stone; he does not agree to pay for any more, nor is a general rate fixed for any quantity beyond that. There are no time limits within which he is to conduct operations, and no sum is paid down except the nominal consideration of one dollar.

Judgment.  
BORN, C.

Without dwelling on the ancient law involved, I may refer to the more recent cases which justify this conclusion: *Grubb v. Bayard* (1851), 2 Wallace Jr. 81; and *Duke of Sutherland v. Heathcote*, [1891] 3 Ch. 504; affirmed, [1892] 1 Ch. 475, where all the English law is collected.

Upon the concession made in the amended answer as to the fifty thousand cords of stone mentioned in the agreement, and it appearing that the defendants are working at a distance from where the plaintiff elected to begin to quarry, I think the action should be dismissed with costs, less the costs occasioned by the attack upon and endeavour to rectify the original agreement of January 13th, 1897, which the defendants should pay. There may be a set-off of costs.

The appeal was argued before BURTON, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 14th and 15th of September, 1899.

*Aylesworth*, Q.C., and *C. A. Moss*, for the appellant.  
*Osler*, Q.C., and *W. M. German*, for the respondents.

January 16th, 1900. BURTON, C. J. O. :—

I agree in the result, although I am unable to concur in the view that even as between the immediate parties it would have been any answer that Troup was imposed upon; it was a very foolish agreement, but he was left perfectly free to seek advice if he had desired it. There are, however, many other reasons why, even as between them, specific performance would not have been decreed.



Judgment.

BURTON,  
C.J.O.

Upon the admissions in the pleadings the plaintiff has the full measure of relief to which he is entitled and the appeal should be dismissed.

OSLER, J.A. :—

I agree in my learned brother Maclennan's judgment in so far as it affirms the judgment of the learned Chancellor at the trial on the ground on which he places it, viz., that on the true construction of the agreement the plaintiff did not acquire the rights on which he insists in this action. The defendants' claim for the rectification of the agreement does not appear to have been pressed with much faith in its soundness or at all events with more faith than it seems to me to merit. I concur rather with the Chancellor's view on this point than the opposite. The appeal should be dismissed with costs.

MACLENNAN, J.A. :—

The judgment as drawn up embodies the submission made by the defendants in the eighth paragraph of the defence, and gives the plaintiff the benefit of it.

We have had the advantage of a very full argument during part of two days, and I have since gone over the whole of the evidence, and I am clearly of opinion that this is not a case in which the equitable relief of specific performance ought to be administered.

As pointed out by the Chancellor, the instrument is not under seal, and although called a lease, there being no defined term, it passed no legal interest in the land. At the most it can only be regarded as a contract, giving the plaintiff the option to buy, quarry, and remove 50,000 cords of stone for the price of 25 cents per cord. As incidental to this option the instrument gives the plaintiff a license to enter upon the land, and to erect and use the necessary machinery and appliances to quarry and remove the stone. But for the option, amounting to a unilateral

contract for the sale of a specific quantity of stone, at a certain price, the license would have been revocable, notwithstanding the payment of the sum of one dollar: *Wood v. Leadbitter* (1845), 13 M. & W. 838, at p. 845; and the subsequent conveyance by Troup would have been a revocation: *Wallis v. Harrison* (1838), 4 M. & W. 538. If this contract, however, had been otherwise unobjectionable, the license would have been irrevocable, being incidental to the contract and necessary for its beneficial fulfilment: *Goddard on Easements*, p. 504 *et seq.*, and authorities there cited.

Judgment.  
MACLENNAN,  
J.A.

I agree with the learned Chancellor that this contract, at best, gives the plaintiff no more than a right to take 50,000 cords, and that it is not an exclusive right beyond that quantity. But to the extent of 50,000 cords, I think it is exclusive. *Duke of Sutherland v. Heathcote*, [1891] 3 Ch. 504; [1892] 1 Ch. 475, cited by the Chancellor, shews that such a right is not exclusive, even when the quantity to be taken is not limited; and see also *Doe v. Woods* (1819), 2 B. & Ald. 724.

There is here no contract for the sale of all the stone; but merely an option to the plaintiff to buy or take 50,000 cords. In his evidence, the plaintiff estimates the quantity of stone on the land to be twelve hundred thousand cords, and values it at 25 cents per cord,—\$300,000. Although, therefore, as I think, the plaintiff has a right to take 50,000 cords, there has been no interference with his right, and he has never been hindered from exercising it according to the terms of the contract.

But it is also clear that this contract is not one which the Court ought to enforce specifically. There are several grounds for this conclusion, which might be mentioned, but it is sufficient to specify one, namely, that the parties understood the agreement which they made differently, and so never did agree at all upon one or more points of the first importance; and that it is proved, and even admitted by the plaintiff, and his counsel, that in some respects the writing wrongly expresses what was really

Judgment. agreed to. The plaintiff says the bargain was that he was to have the whole of the stone; and that he was to pay, not only for 50,000 cords at 25 cents per cord, but at the same rate for the whole. This is denied by Troup, and the writing is silent both as to the right to take, and the obligation to pay for, more than 50,000 cords. The plaintiff also says the bargain was that he was only to have sufficient natural gas to work his machinery. The writing contains no limit or restriction of that kind. It gives him the unqualified and unrestricted right to bore for natural gas. Mr. Good, the lawyer employed by the plaintiff to procure these quarry rights for him, both before and after the one in question, and who drew up the agreement, says that as he understands it, it gives the plaintiff all the gas rights in the land, that he so construes it, and that it so appears to him. But he admits that such was not the agreement. As I read the evidence also, I think the inference is irresistible that, as Troup understood it, there was a limit of time within which the plaintiff was to take the 50,000 cords, and that unless the plaintiff got a contract for furnishing stone for the Buffalo breakwater, he should not require the stone at all, and the contract should become void. Yet there is no limit of time in the agreement; and both the plaintiff and his solicitor swear that no such limit was agreed to, and that if he only made a commencement by the 1st of August he might take fifty years to remove the stone, without any further payment in the meantime. Both the plaintiff and his solicitor reluctantly admit that the supply of stone to the breakwater was the great object of the agreement, and that it was talked of with Troup, and also its probable duration of four or five years. And it is notable that almost the first thing he said to Troup, when beginning negotiations, was that he wanted to spend a good deal of money on Buell's farm, building a dock, and he wanted to be sure of getting the stone he wanted. The significance of this lay in the fact that the Buell farm was adjacent to

MACLENNAN,  
J.A.

that of Troup, with a frontage on the lake, which Troup's farm had not, and he had on the 24th of November procured a quarry lease over that land, with access to, and use of, a dock for shipping stone. The term of that lease was five years, and it was provided therein that if he did not on or before the 1st of August, 1897, obtain a contract for furnishing stone for the construction of the Buffalo breakwater, the agreement should immediately be and become void. It was admitted that the plaintiff got no contract for the breakwater stone, and that the Buell lease had, therefore, come to an end. An examination of the Buell agreement shews the stipulation which Troup, if he had been a business man, or if he had had the assistance of a solicitor, would have required to be inserted in the agreement for his protection. He was not a business man and had not the assistance of a solicitor, and the result was the document which is before us.

Judgment.  
MACLENNAN,  
J.A.

In my opinion specific performance of the agreement either against Troup, or against the other defendants cannot be granted, and as the plaintiff has not been hindered from taking the 50,000 cords mentioned therein, he has sustained no damage. All the defendants, however, having submitted to the terms mentioned in the judgment, the plaintiff is entitled to that, and the appeal must be dismissed.

Moss, J. A. :—

I only desire to add to what my brother MacleNNan has said, that I agree with him in thinking that the construction to be placed upon the document itself is that which has been put upon it by the Chancellor. Other grounds have been put forward and are referred to in the opinion of my learned brother, but as to these I have not thought it necessary to form an opinion, feeling clear upon the construction of the document. I think, that treating it as an existing document that could not be set



**Judgment.** aside or disturbed in any way, the plaintiff is not entitled to greater relief upon it than he obtained from the Chancellor.

**Moss,**  
**J.A.**

LISTER, J. A. :—

I agree.

*Appeal dismissed.*

R. S. C.

## BREWER V. CONGER.

*Lease—Renewal—Option—Mortgage—Redemption.*

Under a covenant in a lease that the lessors would, at the expiration of the term thereby granted, grant another lease, “provided the said lessee \* \* should desire to take a further lease of said premises,” no notice or demand by the lessee is necessary. The existence in fact of a desire for the further lease is all that is essential, and that desire may be indicated by conduct and circumstances.

A lease of land, subject to two mortgages, contained a covenant by the lessor and the second mortgagee with the lessee, that the lessee might if he desired to do so redeem the first mortgage, and that in that case the sum paid for redemption should be a first charge on the land :—

*Held*, that the second mortgagee’s right to redeem the first mortgage, after its acquisition by the lessee, was not taken away.

Judgment of ROSE, J., affirmed.

**Statement.** APPEAL by the plaintiff from the judgment of ROSE, J.

The plaintiff was the second mortgagee of certain lands and brought the action to redeem the first mortgage, held by the defendant Conger, and to foreclose the equity of redemption which had been acquired by that defendant. The defendant Allen contended that she was the lessee of the land in question and entitled to redeem the plaintiff. The facts are stated in the judgment in this Court.

The appeal was argued before OSLER, MACLENNAN, MOSS, and LISTER, JJ. A., on the 9th of October, 1899.

*Aylesworth*, Q. C., for the appellant.

*Clute*, Q. C., for the respondents.

January 16th, 1900. The judgment of the Court was delivered by

Judgment.  
MACLENNAN,  
J.A.

MACLENNAN, J. A.:—

The main question in this appeal is whether the defendant Jane Allen is entitled, as against the plaintiff, to a renewal of the lease of the 24th of March, 1887, which expired on the 10th of May, 1897. The covenant for renewal is that "they (the lessors) will, at the expiration of the term hereby granted, grant unto the said lessee, his heirs, executors, administrators, or assigns, another lease of the premises hereby demised for a further period of ten years, reserving a rental of fifty dollars per annum, payable at the end of each year, and taxes in respect of said demised premises, provided the said lessee, his heirs, executors, administrators or assigns, should desire to take a further lease of said premises." When the lease was made the land was vacant building ground, about one-eighth of an acre in extent, and the lease contained a covenant by the lessors, in addition to the covenant for renewal, that they would allow the lessee and his assigns a period of two months from the expiration of the term, or of the renewal term therein mentioned, to remove all buildings or erections and other improvements, then on the land, or which the lessee or his assigns might at any time during the term or the renewal term, place or erect thereon, which buildings, etc., were to be the sole property of the lessee or his assigns, but not to be removed at any time during the term or the renewal term. Immediately after the making of the lease, the lessee placed dwelling houses upon the land to the value of \$2,000, and at the expiration of the lease Mrs. Allen was in possession by her tenants as assignee of the term. At the date of the lease one Dorn was the owner of the land, subject to two mortgages made by him, the first to one Asselstine for \$640 and interest at 7 per cent. per annum, and the second to the plaintiff for \$1,000 with interest at 6 per cent. per annum.

Judgment. The lessors were Dorn, the owner, and the plaintiff, the second mortgagee; and the plaintiff joins the lessor, not only in the demise, but in all the covenants on the part of the lessors, including a covenant for quiet enjoyment. At the date of the lease the first mortgage was long overdue and unpaid, as was also the plaintiff's mortgage; and the vacant land was then not worth more than the amount due on the first mortgage, if so much, having regard to the rent, \$25 per annum, reserved in the lease. That condition of things accounts for the plaintiff's joining in the lease as lessor, and in the covenants already mentioned, and also in another covenant also contained therein, that should the lessee, or his assigns, desire to redeem the first mortgage, then held by one Cook, he or they might do so, and in that case, the sum paid for redemption should be a first charge on the land, with interest from the time of payment at seven per cent. per annum. It appears from the evidence of Mr. Wilson, the lessee, that on the 17th of the following December, he redeemed the first mortgage, and took an assignment in the name of his two sisters. On the 10th of October, 1892, that mortgage was assigned to the defendant F. D. Conger, and on the 29th of November following, a release of the equity of redemption was obtained from Dorn, also to the defendant Conger, both being obtained on behalf of, and in trust for, the defendant Mrs. Allen, who was then the assignee of the lease. It seems that the rent reserved by the lease, for the years 1888 and 1889, was paid to the plaintiff on account of her mortgage, after which no more was paid to her; and it was explained to her that the omission was in consequence of the arrears upon the first mortgage.

All these circumstances shew how important it was for Mrs. Allen, when the first term was about to expire, to have a renewal of the lease for another term of ten years. The ground rent had not been sufficient to keep down the interest on the first mortgage, and arrears were accumulating. The whole principal sum of \$1,000 was over-

due on the plaintiff's mortgage, and the arrears of interest claimed were about \$500. Not to take a renewal would be great folly. In that case she might remove her buildings which would leave the land vacant, and an insufficient security for the first mortgage.

Judgment.  
MACLENNAN,  
J.A.

Now, what the covenant for renewal says, is that the lessee is to have it, *provided she should desire it*. There is not here any stipulation for notice, or demand, by the lessee, nor any limit of time within which request or demand or notice, is to be made or given; all that is essential is a *desire* for renewal on the part of the lessee. Upon such a covenant as that I think all that is essential is the existence of the desire. No doubt the lessor had a right to know, within a reasonable time, whether there was a desire or not. That could be ascertained by enquiry, if it was thought to be uncertain, or it might be plainly indicated by conduct and circumstances. One necessary party to the new lease here was the defendant Conger, who had the equity of redemption, but who was a trustee for the lessee, and to whom notice of the desire of his *cestui que trust* would be imputed. The plaintiff, who was the other necessary party, had for some years been living abroad, somewhere in the State of California. In the year 1896, Mrs. Allen herself wrote two letters to her, to a certain address in California, but which were returned through the dead letter office; and she says that she desired to renew the lease, and that those letters were on the subject of renewal. She did not discover the plaintiff's true address until the issue of the writ in this action on the 2nd of October, 1897. Mrs. Allen was not a party to the action in the first instance, nor does it appear when the writ was served. The statement of claim was not delivered until the 24th of November, and it simply asks to redeem the first mortgage, and to foreclose the equity of redemption against the defendant Conger. The statement of claim makes no mention of the lease. On the 6th of November, having discovered from the writ of summons the plaintiff's address, Mr. Wilson at once wrote to the plaintiff, on



Judgment. behalf of Mrs. Allen, stating that she desired a continuation of the lease.

MACLENNAN,  
J.A.

There can be no doubt whatever of Mrs. Allen's desire to have a renewal. She says in her evidence that she "never dreamed of such a thing as not taking it;" and about, or shortly before, the end of the term she had made considerable repairs. But besides that, Mr. Wilson, who was known to the plaintiff's solicitors to be her son-in-law, and her legal adviser, says that a few weeks before the expiration of the lease he had a long interview and discussion with the plaintiff's solicitor about the lease and the rent, and why it had not been paid to the plaintiff, and that he then told him that after the 10th of May the ground rent, being increased to \$50 a year, would pay the interest on the mortgage, and that matters would remain in that state until the year 1907, when the lease would expire. This conversation is not denied; and I think it is clear that when the old lease expired, Mrs. Allen was in fact desirous of obtaining a renewal; that she made reasonable efforts to make this known to the plaintiff, and that the desire was in fact communicated and known to her solicitor. There are also the important facts, that Mrs. Allen remained in possession by her tenants, and took no steps to remove the buildings within the two months after the end of the term, as she was at liberty to do, under the lease, if she did not desire a renewal.

There are many reported cases in which it was held that the tenant had lost the right of renewal, provided for in his lease, by not making request or demand therefor within a time expressly limited, or by neglect to perform some condition upon which his right depended. But this is not a case of that kind. There is no time limit, and no condition. The proviso that the tenant should *desire* a renewal, is no more than would be implied even if not expressed. It meant no more than that the renewal was to be at his option.

The case of *Moss v. Barton* (1866), 35 Beav. 197, and *S. C.*, L. R. 1 Eq. 474, was a much weaker case than the present in favour of renewal. There the covenant was to grant

a lease for five, seven, fourteen, or twenty-one years, from the expiration of a three years' term, at the request of the lessee. The three years expired at Christmas, 1860. The tenant remained in possession, as tenant from year to year, and in 1862 applied for a lease, at a different rent, and for a different time, from that provided by the covenant for renewal, which was refused. He also applied to the lessors for £16 8s., which he had paid for repairs, which under the lease he was bound to make at his own expense, and which the lessors paid to him. Two years later he applied for the renewal he was entitled to under the covenant, and he was held entitled to it, notwithstanding the lapse of time, and the other circumstances of the case. Another case of *Buckland v. Papillon* (1866), L. R. 1 Eq. 477, may also be referred to. The covenant there was to renew "whenever called upon so to do," the existing term being for three years. The covenant was in 1856, and the demand for renewal was not until 1865, and it was held not to be too late, the tenant having remained in possession. This case was carried to appeal before Chelmsford, L. C., and was affirmed (1866), L. R. 2 Ch. 67. *Moss v. Barton*, was cited without disapproval. At p. 70 the Lord Chancellor says: "He (the tenant) had done nothing whatever to preclude him from demanding that lease at any time; and if the landlord wished to know upon what terms the tenant held, he might have called upon him to say whether he meant to have a lease or not." So here, if the plaintiff or her solicitors had any doubt, they could have enquired. I do not think they had any doubt, or, any more than Mrs. Allen, even dreamed of her not being desirous of a renewal.

I am, therefore, clearly of opinion that on the question of Mrs. Allen's right of renewal the judgment is right and ought to be affirmed.

The other question is as to the redemption of the first mortgage. On the argument I was unable to see any ground on which the plaintiff's claim to redeem the first mortgage, and to foreclose the equity of redemption, could be refused. The plaintiff could have redeemed the first

Judgment.  
MACLENNAN,  
 J.A.

Judgment. mortgage the very day after, and at any time after, the making of the lease, and, having done so, could have foreclosed Dorn. If he failed to pay both mortgages, she would then have become the sole owner of the property subject to the lease. She has the same right still, and it makes no difference that the first mortgage has been redeemed by Mrs. Allen, and that both that and the equity of redemption are held by a trustee for her. If Mrs. Allen desires to retain the equity of redemption, and to be the absolute owner of the property, she must redeem the plaintiff. But if all she wants is to be repaid the amount of the first mortgage, and to hold her lease, she must let the equity of redemption go.

MACLENNAN,  
J.A.

Mr. Clute's contention was that the 'covenant in the lease enabling Mrs. Allen to redeem the first mortgage, somehow made that mortgage irredeemable in her hands to protect her lease, and the learned Judge seems to have acceded to that view. I think, however, that contention cannot be upheld. The only effect of that covenant was to make the sum paid by the lessee, whatever it might be, for principal, interest and costs, a charge with interest on the whole sum at seven per cent. It is clear that with the covenant the lessee could for the protection of her possession redeem the first mortgage, and could recover what she had paid, from the lessors, under the covenant for quiet enjoyment; and if the plaintiff redeemed it, or if she redeems it now, she would be restrained from making any use of it to disturb the lessee. The plaintiff is, therefore, entitled to the usual judgment for redemption and foreclosure against the defendant Conger.

It seems that when the appeal was lodged, and also when the reasons for and against the appeal were drawn, the judgment had not been drawn up. It was afterwards settled and issued on the 22nd of May, 1899, and is the judgment for redemption and foreclosure to which the plaintiff is entitled. The appeal will, therefore, be dismissed.

*Appeal dismissed.*

R. S. C.

## KIRBY V. BANGS.

*Will—Construction—Contingent or Vested Interest—Legacy.*

A testator devised certain property to trustees, to hold it in trust for twenty years after his decease ; during that time to pay the income to his widow and children, naming them, in certain shares ; and after the expiration of twenty years to sell and to divide the proceeds among his "said children" in certain shares :—

He also devised certain other property to the trustees upon trust to sell from time to time as they in the exercise of "full discretion" should think fit, and to pay the income to his widow for life, and upon her decease, to divide the corpus among his children, naming them, in certain shares :—

*Held*, affirming the judgment of MEREDITH, J., that the children took vested interests.

APPEAL by the defendants from the judgment of Statement.  
MEREDITH, J. .

The action was brought for the construction of the will, made on the 24th of July, 1890, of Chauncey Ward Bangs, who died on the 21st of March, 1892.

The following are the material portions of the will :—

"1. I devise and bequeath my property on the north side of Sparks street in said city of Ottawa, being lot number twenty-eight on said street and forming the north-east corner of Sparks and Elgin streets and known in said city as the Bangs block, unto my trustees hereinafter named to hold the same in trust during twenty years after my decease and during that time to pay the rental income thereof in semi-annual payments among my wife and children in the manner and in such shares as is hereinafter directed and then after the expiration of such twenty years in trust to convey and convert the same into money by auction or by private sale or otherwise and to divide the proceeds among my said children in such shares as is hereinafter directed.

2. I devise and bequeath my residence or dwelling-house that I now occupy with the lands and buildings now occupied therewith and the household furniture therein and thereabout together with my horses, vehicles and all other goods and chattels used in connection with my said resi-



Statement. dence and also the land adjoining my said residence lately purchased from the Hardy estate unto my said trustees to permit my dear wife to occupy, use and enjoy each and every the same during her life and after her decease in trust to sell and convert the same into money by auction or by private sale or otherwise and to divide the proceeds among my children as is hereinafter directed, but I devise further, that it shall be lawful for my said trustees at any time or times during the widowhood of my wife with her consent in writing to sell and convey the said dwelling-house and land occupied therewith, the furniture, and effects, goods and chattels, horses and vehicles and the said lands purchased from the Hardy estate or any part of said land, goods and chattels and to divide the proceeds of such sale among my children as is hereinafter directed, and I direct that the taxes and other municipal rates of my said residence and the said Hardy property be paid by my said trustees out of the revenue of my residuary estate hereinafter referred to.

3. I devise and bequeath all the residue of my real estate and of my personal estate of every nature and kind whatsoever and wheresoever situate, including all ready moneys, unto my said trustees upon trust that my said trustees shall at such time or from time to time as to them or the continuing one of them seems proper, and I hereby empower them or him to, sell, call in and convert the same into money or such part thereof as shall not consist of money and shall with and out of the moneys produced by such sale, calling in and conversion, and out of my ready money pay my funeral and testamentary expenses and other debts, and then and thereafter hold the balance of the proceeds of such sale, calling in and conversion, and my ready money in trust and invest the same during the life of my wife, and during that time to pay the revenue thereof after payment of the taxes and other municipal rates of my said residence and the said Hardy estate and of such of my said residuary real estate as may from time to time remain unsold, to my said wife in annual pay-

ments, and upon my wife's decease or so soon thereafter as such moneys so invested can be called in, to divide and pay over the proceeds of such sale and conversion and all my ready money among my children as is hereinafter mentioned. Statement.

4. I devise and direct that the revenue of my said property known as the Bangs block, situate at the north-east corner of said Sparks and Elgin streets be after all expenses of maintaining the same in repair are paid and after all taxes and other municipal rates of the same are first deducted thereout be divided by my said trustees into sixteen equal shares semi-annually during the said twenty years after my decease or until the sale thereof by my trustees and that during that time that such shares of said revenue be paid by my said trustees to my children semi-annually in the manner following, that is to say, to pay two of such shares to my son William C., one share to my son Thomas, one share to my son John A., one share to my daughter Elizabeth, the wife of David Gardner, two shares to my daughter Emma, the wife of William Gardner, two shares to my daughter Lucy, two shares to my daughter Maria, two shares to my son Chauncey Ward, three shares to my wife during her life, and upon her decease one of such three shares allotted to her to my son Chauncey Ward, another one of such three shares to my said daughter Elizabeth, and the other of such three shares to my said daughter Maria, and upon the decease of my said son Thomas, should he die before the expiration of such twenty years, in trust to pay the said share allotted to him equally among those of my said children that are then living and the children of any of my deceased children, and upon the decease of my said son John A., should he die before the expiration of said twenty years in trust to pay one-half of the said share allotted to him to his son John Ward and the other one-half thereof to the other surviving children of my son John A. share and share alike; and I devise further and direct that at the expiration of said twenty years and upon or so soon thereafter as my said trustees

Statement. shall effect the sale of my said Bangs block, the proceeds of such sale shall be divided by my said trustees into sixteen equal shares and that such shares be divided and paid over by my said trustees to and among my children as follows, that is to say, two shares to my said son William C., two shares to my said daughter Elizabeth during her life, two shares to my said daughter Emma, two shares to my said daughter Lucy, three shares to my said daughter Maria, three shares to my son Chauncey Ward; and I devise and direct that my said trustees shall hold in trust and invest one of such shares during the life of my said son John A. and during that time pay him annually the revenue thereof and upon his decease in trust to pay one-half of the said share itself to his son John Ward and the other half of said share equally among his other children forever; and I devise further and direct that my said trustees shall hold in trust and invest the one other share of said sixteen shares during the life of my said son Thomas J., and during that time to pay him annually the revenue thereof during his life, and upon his decease to pay such share equally among my other children; and I devise further and direct that my said trustees shall hold in trust and invest the said two shares devised to my daughter Elizabeth for life, during her life and during that time to pay her annually the revenue thereof, and upon her decease to pay one share to her daughter Bertha and the other one of such shares equally among my other children.

5. I devise and direct that should my residence and other real and personal property, or any part thereof, referred to in the second and third paragraphs hereof, be sold during the lifetime of my wife, then that upon such sale, the proceeds of such sale be held in trust and invested by my said trustees for the benefit of my wife, and to pay the revenue thereof after payment of taxes and other rates of such part thereof as may not then be sold, to my wife annually, and that upon her decease I direct and empower my said trustees to sell and convey such of said real and personal property as is then unsold, and so soon as the whole

of such real and personal property is sold to divide the proceeds of such sale into sixteen equal shares, and then in trust to forthwith pay such shares among my said children as follows, that is to say, two shares to my said son William C., two shares to my said daughter Elizabeth, during life, two shares to my said daughter Emma, two shares to my said daughter Lucy, three shares to my said daughter Maria, three shares to my son Chauncey Ward; and I devise and direct that my said trustees shall hold in trust, and invest one of such shares during the life of my said son John A., and during that time to pay him annually the revenue thereof, and upon his decease, in trust to pay one-half of such share to his son John Ward, and the other half of such share equally among his other children forever; and I devise further and direct that my said trustees shall hold in trust and invest the one other share of said sixteen shares during the life of my said son Thomas J., and during that time to pay him annually the revenue thereof and upon his decease, in trust to pay such shares equally among my other children; and I desire further and direct that my said trustees shall hold in trust and invest the said two shares devised to my daughter Elizabeth for life, during her life, and during that time to pay her annually the revenue thereof, and upon her decease to pay one share to her daughter Bertha, and the other one of such shares equally among my other children.

I declare that my trustees shall have a discretionary power to postpone for such period or periods as to them or the continuing trustee or trustees shall seem expedient and beneficial, the sale and conversion of my said real and personal estate or any part thereof; and I further declare that during the period or respective periods during which my trustees shall under the aforesaid provisions have the management of the said Bangs block and of my other lands and property, real and personal, my trustees shall have ample and the exclusive power to let any hereditaments, the said Bangs block or any part thereof, while unsold, either from year to year or for any term of years, at such rents

Statement.



**Statement.** and subject to such covenants as they shall think fit, and to appoint and remove stewards, agents and servants, to direct repairs, alterations and improvements, to raise and reduce and collect by distress or otherwise all rents, accept surrenders of leases and tenancies, to make allowances to tenants and others, and to do and cause to be done all such acts and things relating to the management of said property, real as well as personal, as my trustees shall in their discretion think fit ; and I declare further, that after the delivery to my said wife of the several chattels and effects the use whereof is hereinbefore given to her for life, my trustees shall not be bound to see to the preservation of the same or any of them, nor be answerable for any loss or injury thereof while in her use.

\* \* \* \* \*

I desire it to be clearly understood and I direct that notwithstanding any provisions or directions hereinbefore contained, that my trustees aforesaid and their successor or successors in office shall have full and the sole discretionary power to postpone from time to time and for such time as to them shall in their opinion in the interests of my estate seem expedient, the sale or sales of said real and personal estate or any part or parts thereof, but I direct that the said Bangs block (which includes the part of said block lately erected by me) shall, as I have hereinbefore directed, not be sold under any circumstances, until after the expiration of the said twenty years after my decease.

I direct that should any child of mine save and except my sons John A. and Thomas J. die before he or she receives his or her share under this will finally and absolutely leaving a child or children him, her or them surviving then and in every such case such child or children shall take the share of the revenue of my estate and afterwards the share itself of my estate which his or her or their parent would have taken if such parent had lived till after such final disposition.

I direct further, that should my said trustees, with my Statement.  
wife's consent, sell my said residence, then it shall be lawful for my said trustees to employ a portion of the proceeds of such sale to erect a suitable dwelling to be held in trust by them for my said wife's occupation on the said Hardy estate or in such other part of the city as my wife may desire, and upon her decease to be disposed of by them in the manner that my residence would have been disposed of upon her decease.

I desire it to be clearly understood and I direct that my said trustees, their successors or successor, the survivor or survivors of them, shall have, and I hereby invest them or him with full power to sell, convey and execute conveyances of my said real estate or any part thereof in the time or times above mentioned."

William Chauncey Bangs, one of the testator's children, called in the will "William C.," died on the 10th of August, 1896, having by his will, made on the 29th of January, 1896, devised to the plaintiffs, upon the trusts therein declared, all his real and personal estate of every nature and kind. He died without leaving a child him surviving, and the question was whether he had any vested interest under his father's will.

The action was heard on motion for judgment on the 2nd of June, 1898, before MEREDITH, J., who, on the 6th of August, 1898, gave the following judgment:—

MEREDITH, J.:—

Everything in controversy in this action depends upon the answer to the one question:—

Are the legacies vested or contingent?

One point only was urged in support of the claim that they are contingent; it was said that they are legacies so charged upon lands as to be within the well-known exception to the rule in favour of vesting.

But I am of opinion that they are not legacies within

Judgment. that exception. The whole of the testator's estate, real and personal, is given to the executors in trust to convert it eventually into money, and the legacies are to be paid out of the income for a while and eventually out of the corpus ; nothing is left to heirs or devisees, and those who take the whole benefit of the whole estate, are the heirs-at-law and widow only ; so that the case seems to be, not only not within the exception to the rule but within the stated reason for that exception : see *In re Hart's Trusts* (1858), 3 DeG. & J. 195, and *Turner v. Buck* (1874), L. R. 18 Eq. 301 ; and see also *Attorney-General v. Milner* (1744), 3 Atk. 112, the converse of this case.

MEREDITH,  
J.

Had the legacies been charged upon land, I would not have considered the rule, in its present modified form, applicable because the postponement of the times of payment seems to me to have been made for the convenience of the estate and not with reference to the circumstances of the legatees.

There is another point which was not argued, but which ought not to be passed over. It is open to argument that there are really no gifts to the legatees, but merely directions to divide the estate at future times among them.

But there seems to me to be more than one sufficient answer to this objection, if made, to the plaintiffs' claim.

In the first place, looking at the whole will, there may, I think, be said to be a gift of the whole estate to the trustees for the sole and immediate benefit of the legatees ; the income payable as fast as it accrues, the principal at the times fixed by the testator.

And if that were not so, the postponement of the times for payment, being, as I have said, in my opinion, for the convenience of the estate and not with reference to the circumstances of the legatees, the legacies would vest if there were no immediate gift.

Looking at the question generally, the will is a comprehensive provision for the testator's wife and children after his death ; in it he seems to have provided for every likely event, so that it is highly improbable that he did not think

of such an event as that which has happened ; the death of a child without leaving issue after his death, but before becoming entitled to receive all that the will in effect gives to such child ; or that he thought of such an event and left it unprovided for, an intestacy to that extent with the difficulties it might occasion. He carefully provided for life interests only in two of his sons and one of his daughters and for the absolute disposal of their shares, after their deaths ; and as to other children, including the plaintiffs' testator, provides for their children taking their shares, in the event of the parent dying " before he or she receives his or her share " under this will. And he blended both real and personal property in one instance.

Judgment,  
MEREDITH,  
J.

It is a strong point in the plaintiffs' favour that there will be a partial intestacy, if their claims be rejected. In the care shewn there was certainly no thought of such a result, but there was manifestly much care to avoid it.

It seems to me that the testator understood and meant that his children's estates would and should receive their legacies in events such as that which has happened in this case.

There will be judgment accordingly, costs out of the estate.

The appeal was argued before OSLER, MACLENNAN, MOSS, and LISTER, JJ. A., on the 10th of October, 1899.

*Osler*, Q. C., for the appellants. The provision for William Chauncey Bangs is one charged upon the testator's real property, payable at future times, and in accordance with the rule in such cases the gift did not vest, but lapsed or terminated upon the death of the legatee or beneficiary before the date of the final disposition of the property : *Pearce v. Loman*, and *Pearce v. Taylor* (1796), 3 Ves. 135 ; *Gawler v. Standerwick* (1788), 2 Cox 15 ; *Parker v. Hodgson* (1861), 30 L. J. Ch. 590. A time was fixed by the testator at which the interests of the parties should be finally determined, and the gifts take



**Argument.**

effect, and this time was the sale of the property, before which there was not intended to be a vesting of their respective interests, other than in the case especially excepted by the will, namely, that of the death of a child leaving children : *Bolton v. Bailey* (1879), 26 Gr. 361; *Elwin v. Elwin* (1803), 8 Ves. 547. There are no words of present gift with respect to either of the three classes of property mentioned in the will, but only a direction to distribute at a certain time in the future, and that the testator's intention was that the property should remain in the family and not go to others than children of his children, is apparent.

*A. J. Boyd*, for infants in the same interest, and

*W. B. Raymond*, for the executors of the will in question, submitted to the direction of the Court.

*Aylesworth*, Q. C., for the respondents. There is no indication anywhere in the will of any desire on the part of the testator to suspend or postpone the operation of the bequests, and therefore an immediately vested interest was conferred. The main argument to the contrary is that these legacies are so charged upon lands as to be exceptions to the general rule in favour of immediate vesting. But the legacies in question are not charged upon land at all : real estate is devised to trustees for sale, to be converted into money after the expiration of twenty years, the rental income which may accrue in the meantime to be periodically distributed by the trustees as the will directs. There is no gift to any legatee of a legacy which, till payment, is to be an incumbrance or charge upon any land. The lands are to be converted and upon conversion, whether *pro tanto* as rent or finally by sale, the proceeds are bequeathed as the will directs. Moneys to arise from the sale of land are not within the rule which governs in the case of pecuniary legacies charged on land : *In re Hart's Trusts* (1858), 3 DeG. & J. 195 ; *Turner v. Buck* (1874), L. R. 18 Eq. 301. But if there was here any gift of pecuniary legacies charged upon land the postponement of their payment which the will makes has reference to the situation

or convenience of the estate, and not to the circumstances of the legatees, and in such case the charge does not fail by reason of the death of a legatee before the time of payment: *Rogers v. Carmichael* (1892), 21 O. R. 658; Jarman, 5th ed., p. 792, and cases there cited. The gift of the rental income is opposed to the idea that there was intended to be any suspension of the vesting: it is the compensation for the deferring of the enjoyment of the corpus to which it supposes a title: Jarman, 5th ed., p. 802, note (*v*). There is by this will a clear gift of the whole estate to the trustees upon the various trusts set out in the will and there is no force in the objection that no gift is made to any legatee. The trust to distribute and the direction to pay make a sufficient gift. The construction contended for by the appellants would involve a partial intestacy and the whole frame of the will shews the intention of the testator to provide for every contingency that could arise. He has made a gift over of the very legacies now sued for in the event, which did not happen, of William Chauncey Bangs dying before the receipt of his full share leaving a child or children him surviving. The intention to benefit the grandchildren, if there were any, is manifest. The intention must have been that if William Chauncey Bangs should have no children he might dispose of his share as he pleased: Jarman, 5th ed., p. 767, note (*f*), and p. 793.

Argument.

*Osler*, in reply.

January 16th, 1900. MACLENNAN, J.A. :—

Having had the opportunity of reading the judgment of my brother Moss, and agreeing as I do with the reasons which he has there expressed, I have very little to add.

I desire, however, to point out that the language used in clause one of the will is wholly inconsistent with the appellants' contention, so far as concerns the Bangs block.

By that clause the testator devises the Bangs block to his trustees, in trust during twenty years after his decease, and during that time to pay the rents in semi-annual pay-

Judgment.   ments among his wife and children "in the manner and in  
MACLENNAN, such shares as is hereinafter directed." Pausing there, and  
J.A.       looking at the after part of the will, where the manner and  
shares are directed, it is clear that the children who are to  
take the rents are all the testator's children, without ex-  
ception, who should survive him. Clause one then pro-  
ceeds to direct that after the expiration of such twenty  
years, the trust was to convert the block into money by  
auction, or by private sale, or otherwise, and to divide the  
proceeds among my said children, in the shares afterwards  
directed. The trust of the ultimate proceeds is, therefore,  
for the same children to whom the intermediate rents are  
given, and the function of clause four is merely to  
direct or define the shares which each child was to receive.  
I think, therefore, it is clear, that the shares of all the  
children, of the proceeds of the Bangs block, are vested by  
the express terms of the first clause, and that there is  
nothing in the subsequent parts of the will to make them  
contingent.

If that be the proper conclusion with reference to the  
Bangs block, it would require something very strong in-  
deed to make it proper to hold the shares of the home-  
stead, and of the residue, to be contingent upon survivor-  
ship, until the end of twenty years, or until payment.  
Instead of that, we find that the proceeds of the home-  
stead and of the residue are to be divided in the same  
manner and in the same shares and proportions precisely  
as the proceeds of the Bangs block; and I think it is not  
unimportant, in support of the same inference, that there  
is no time absolutely fixed for the sale and conversion of  
the several parts of the estate, or consequently for the final  
division and payment. The testator directs that the Bangs  
block is not to be sold, under any circumstances, until the  
expiration of twenty years after his decease; but he gives  
the trustees absolutely discretionary power to postpone  
from time to time, and for such time as in their opinion  
in the interests of his estate might seem expedient, the sale  
or sales of his real estate, or any part or parts thereof. I

think the effect of that provision is, that the estate might be divided, from time to time, as sales might be made from time to time, according to convenience and expediency, in the interest of all parties. It would be strange indeed if the vesting of the children's shares should be dependent upon the expediency, in the discretion of the executors, of selling, or not selling, particular parts of the estate, at any particular time.

Judgment.  
MACLENNAN,  
J.A.

I think the appeal should be dismissed.

Moss, J. A. :—

The contest in this case is between the executors and trustees under the will of William Chauncey Bangs on the one hand, and the heirs and next of kin of Chauncey Ward Bangs on the other, and the subject matter of the contest is a share of the estate of Chauncey Ward Bangs which by his will was devised and bequeathed to William Chauncey Bangs.

It is not a contest between the first named parties and a child or children of their testator William Chauncey Bangs, and the question is not whether there is in the will of Chauncey Ward Bangs a valid gift over to grandchildren of the latter under which they would take the share in question in the events which have happened.

If that were the question I think that, upon the weight of authority after much difference of opinion and some conflict of decision, it would have to be resolved in favour of the grandchildren.

The direction that "should any child of mine \* \* die before he or she receives his or her share under this will finally and absolutely leaving a child or children him, her or them surviving then and in every such case such child or children shall take the share of the revenue of my estate and afterwards the share itself of my estate which his or her or their parent would have taken if such parent had lived till after such final disposition," manifests, and, I think, expresses in definite terms a clear intention that the prior



Judgment.

Moss,  
J.A.

gift to children is subject to be divested in favour of the child or children of such of the testator's children as are there specified dying before the period of actual receipt of his or her share leaving children surviving: see *Johnson v. Crook* (1879), 12 Ch. D. 639; *Bubb v. Padwick* (1880), 13 Ch. D. 517; *In re Chaston*, *Chaston v. Seago* (1881), 18 Ch. D. 218; *In re Wilkins*, *Spencer v. Duckworth* (1881), 18 Ch. D. 634. But what has happened in this case is that William Chauncey Bangs died without leaving any child or children him surviving; and as to his share under his father's will there is no gift over in the event which has happened.

The case, therefore, falls to be determined by reference to the ordinary rules with regard to the vesting of interests given by will.

As respects the property spoken of as the Bangs block, there is, I think, an immediate vesting, not only in interest, but in possession or enjoyment. The period of sale and distribution of the proceeds is postponed for twenty years not on account of any reason personal to the beneficiaries, but the time is postponed evidently for the convenience of the estate, those who are ultimately to receive the corpus being in the meantime the recipients of a large proportion of the income or revenue.

As respects the homestead and the furniture and chattels appertaining thereto and the residue of the testator's real and personal estate there is, I think, a vesting in interest though there is a postponement of the vesting in possession in order to let in the life estate or interest of the testator's widow.

The whole estate is vested in trustees who hold for the benefit of all interested therein, and it is doubtful whether it is correct to say that the only bequest or devise to the ultimate beneficiaries is in the form of a direction to divide and pay over at a future period. But if it be so the rule in such cases is that a gift in the form of a direction to pay or to pay and divide at a future period vests in interest immediately if the payment be postponed for the

convenience of the estate or to let in other interests. Judgment.  
“ There is no gift in those cases, except in the direction to Moss,  
pay, or in the direction to pay and divide. But if, upon the J.A.  
whole will, it appears that the future gift is only postponed to let in some other interest, or, as the Court has commonly expressed it, for the benefit of the estate, the same reasoning has never been applied to the case. The interest is vested notwithstanding, although the enjoyment is postponed,” *per* Wigram, V.-C., in *Packham v. Gregory* (1845), 4 Ha., at p. 398.

Upon the whole will I conclude that there was an immediate gift to William Chauncey Bangs of a beneficial interest subject to be defeated upon the condition subsequent of death after the testator, but before receipt finally and absolutely of his share, leaving a child or children him surviving. In that event his share would have gone over to such child or children. But in the events which have happened I think the judgment appealed from is right and that it should be affirmed, with costs against the appellants.

The plaintiffs submitted that the costs up to judgment should not have been given out of the estate, or at all events that no part should have been charged against the share of William Chauncey Bangs.

But in view of the nature of the questions and the shape which the action eventually took, whereby it was resolved into an action for the construction of the will and a declaration of the rights of all parties thereunder, the discretion exercised by the Judge of first instance with regard to the costs of the action should not be interfered with.

OSLER, and LISTER, JJ.A., concurred.

*Appeal dismissed.*

R. S. C.

ROMBOUGH V. BALCH AND PEPPARD AND NEW YORK AND  
OTTAWA RAILWAY COMPANY.

GREEN V. NEW YORK AND OTTAWA RAILWAY COMPANY  
AND BALCH AND PEPPARD.

*Master and Servant—Negligence—Damages—Death of Child—Railway—  
Want of Lock at Switch.*

The omission to have a lock at a railway switch not otherwise securely guarded, situate near a much travelled highway, is such negligence as to make those having control of the railway liable in damages for the death of their servants resulting from the switch becoming misplaced. In an action by a parent to recover damages for the death of his child there need not be evidence of pecuniary advantage derived from the deceased; it is sufficient if there is evidence to justify the conclusion that there is a reasonable expectation of pecuniary benefit to the parent in the future, capable of being estimated. Judgment of ROBERTSON, J., affirmed.

Statement. APPEALS by Balch and Peppard in each case from the judgments of ROBERTSON, J., at the trial in favour of the plaintiffs.

The following statement of the facts is taken from the judgment of MOSS, J. A.:—

These two actions—with another not now in question—were tried together before Robertson, J., and a jury. They arose out of the same occurrence and by agreement the findings of the jury with regard to questions common to both were made applicable to each of the cases. Upon the answers to questions submitted to the jury the learned Judge entered judgment against the defendants Balch and Peppard in each case. The plaintiffs in the first case were awarded \$2,500, apportioned as stated in the judgment, with costs, and the plaintiffs in the second case were awarded \$1,500, apportioned as stated in the judgment, with costs. The actions were dismissed as against the New York and Ottawa R. W. Co. without costs.

The defendants Balch and Peppard were sub-contractors for the construction of a portion of the line of the Ottawa

and New York Railway Company between the City of Statement.  
Ottawa and the Town of Cornwall.

For the purposes of their work they were maintaining and operating gravel trains from a gravel pit situate near a station called Newington, at which gravel was taken up and distributed along the line for ballasting purposes.

On the 10th of June, 1898, the day on which the accident happened, these trains were being run from the gravel pit to a point some ten miles north of Embrun station.

There was at one side of the main line at Embrun a siding with switches. About six o'clock in the evening a loaded gravel train in charge of one Greenley, conductor, and one Murray, engine driver, both in the employ of Balch and Peppard, was proceeding northward from the gravel pit to the dumping point, when at the south point of the switch it left the rails and several persons were killed and injured. Jacob W. Rombough and George W. Green, who were on the train, were amongst those killed, and these actions are by their personal representatives and others of their relatives under the Fatal Injuries Act.

The switch in question is what is known as "the split switch," the points being moved by means of a rod connected with an upright having a crank made to revolve by means of a lever, thus opening or closing the switch. When the lever is not in use it should drop into a notch or slot and hang vertically, and when required to be used it is lifted up until horizontal. While the lever hangs vertically the switch points remain immovable, but by lifting the lever to a horizontal position and by giving it a trifling movement to the right or left the points may be displaced in a slight degree, not sufficient, perhaps, to be noticed, but sufficient to throw the wheels of an engine or car from the rails. For guarding against this happening there is provision in the switch stand and lever for a switch lock, by means of which the lever can be rendered immovable until the lock is opened by the proper key.



Statement. Near the upper end of the revolving upright is a disc or "target" which shews the setting of the switch. If the switch is open, so that an approaching train will leave the main line and go upon the siding, the target is at right angles to the main line. If the switch is closed the target is turned parallel to the main line.

The jury found, amongst other things, that the switch in question was under Balch and Peppard's control at the time of the accident, that it was their duty to keep the switch in proper position, that the accident was due to their negligence, that the cause was a misplaced switch, that it was not properly guarded, that the switch point was sprung away from the rail because the lever was out of the notch, but could not tell by what means it was out.

The defendants having contended that the engineer Murray, in charge of the engine, was running the train at an excessive rate of speed, contrary to orders, and that his misconduct in disobeying orders or his negligence, whichever it was, caused the accident, the jury were asked the following questions:—(4) "Was there negligence on the part of the engineer, Murray, in running over the bridge and switch in question at a rate exceeding eighteen miles an hour, having regard to the condition of the bridge and the instructions given to him?" To which the jury answered "No." (5) "If you find there was negligence on the part of Murray, was the accident due solely to his negligence, if not, to what other cause was it due?" To which the jury answered: "By switch not being properly guarded."

The appeals were argued before OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 10th of October, 1899.

*Cassels, Q.C., and A. W. Anglin, for the appellants.*

*Aylsworth, Q.C., and C. H. Cline, for the respondents Rombough et al.*

*G. I. Gogo, and H. Beattie, for the respondents Green et al.*

*R. A. Pringle, for the railway company.*

January 16th, 1900. OSLER, J.A. :—

Judgment.

OSLER,  
J.A.

As to *Rombough's* case: The questions in this case are: (1) Whether the deceased at the time of the accident was in the employment of these defendants; (2) whether the absence of a lock or guard upon or at the switch where the train on which he was riding left the track was a defect in the condition or arrangement of the ways, works, machinery, or plant, connected with or used by the defendants in the construction of the works upon which the deceased was engaged; (3) if it was, whether this defect is to be regarded as the proximate cause of the accident or whether it ought not rather to have been attributed to the disobedience of orders by the engineer of the train in running over the bridge near the switch at an excessive rate of speed; and (4) if the plaintiff is entitled to recover at all, whether the damages should not have been limited to the amount specified in section 7 of the Workmen's Compensation Act, viz., \$1,500.

As to the first question, which is really a question of fact, there is no objection that it was withdrawn from the jury improperly. The parties settled the questions which were to be submitted to them after a long discussion at the trial, and while this question was one of those discussed it was not pressed after the learned trial Judge had expressed the opinion that the deceased was in the defendants' employment and that there was no necessity for this particular question being asked. Considering the course taken at the trial, that the question was not pressed nor any objection taken to the Judge's ruling that it should not go to the jury, the objection cannot go further than this, that there was no evidence on which the jury could have found that the deceased was in the defendants' employment had the question been left to them. In this respect the objection fails, for I think the learned Judge rightly decided (if, as he said, the question was one for him to decide, and it seems to have been so left to him), that the

Judgment.

OSLER,  
J.A.

deceased was in the defendants' employment when the accident happened.

He was employed at the dump, as it is called, where the gravel brought by the construction train is unloaded and distributed, and his duty there did not end until the last train had come in for the day. When he left the dump, early in the afternoon of the day of the accident, by a construction train returning to Finch station after its load had been discharged, he and others with him had reason to suppose that, under the circumstances which had occurred, that was the last train which would be at the dump with gravel on that day, and he and they took that train as far back as Finch on their way to their own homes. On arriving at Finch it turned out that there was to be another train leaving there that afternoon with gravel for the dump, and, as may properly be inferred, the deceased and his comrades, who were under the orders of the conductor of the train, went back on the way to the dump on that train by his orders for the purpose of discharging it. They were taken to the dump in the morning and had the right to leave it in the evening by the construction train, and it would be, I think, to take altogether too narrow a view of the evidence and of the relations of the parties, to hold that, because of some mistake for which, so far as appears, he was not responsible, the deceased left his work for an hour or two on the day in question, he was not in the employment of the defendants when he was on the way back to the dump under the orders or at the request of the conductor of the train under whose direction he was to unload it.

On the second question there was, I consider, abundant evidence for the jury that a lock was a necessary and usual precaution against the switch being interfered with by malicious or meddlesome persons or children. Though the switch itself may have been a complete instrument as a piece of machinery without a lock, yet when in position and intended for use, whether by the defendants in running their construction train or by the

railway company in running their ordinary trains, it was a thing liable to be easily displaced or partly displaced by any chance handler of it with just such disastrous results as occurred in the present case. I do not see how the defendants discharge themselves from liability by saying that the company with whom they were sub-contracting for building the line had not supplied them with locks for the switches. So far as they and their own servants were concerned the railway and its appliances were their own plant and machinery for the construction of the work, and it was their duty to see that it was free from defects within their own power to remedy at a trifling expense, making it dangerous to their workmen while it was under their control and was in process of construction. The jury have found that the switch was not properly guarded—whether by not being locked or spiked or not having a watchman at the spot we do not know—but there was evidence that for want of one or other of these precautions the accident happened, and that is enough to support their answer.

Judgment.

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OSLER,  
J.A

Then, thirdly, was the displaced switch the proximate cause of the accident? The jury have so found. How can we say that they were wrong?

It was strongly urged upon us that the derailment of the train ought to be attributed to the high rate of speed at which the train entered or struck the switch, and that if it had been run slowly, as it should have been, over the bridge near the switch, it would necessarily have entered the latter so slowly that it would not have run off the track, or the deceased and others might have escaped by jumping from the train.

The answer seems to me to be that the negligent act of running the train too fast over the bridge had no such direct connection with the negligent act of leaving the switch unguarded as to oblige us or a jury to hold that the former was the proximate cause of the accident. Moreover, the consequences of that negligence were exhausted as soon as the train left the bridge, for it was



Judgment.

OSLER,  
J.A.

not negligent to run the train after it had done so at any rate of speed it could attain. I mean that the order to run slow had relation to the bridge and not to the switch. We find, in short, in the condition of the switch, an effective cause of the accident, to use the language of Lord Esher, and we need not entangle ourselves in philosophical speculations whether there may not have been some other cause, the "propulsion" of which may possibly have had something to do with it: *Town of Prescott v. Connell* (1893), 22 S. C. R. 147; *Engelhart v. Farrant*, [1897] 1 Q. B. 240.

*Hill v. New River Co.* (1868), 9 B. & S. 303, relied upon by the defendants, does not assist them. There the jury were at liberty to infer that the natural and probable cause of the plaintiff's horses running away was their taking fright from the spout of water in the road from the defendants' water pipe, and that the accident which happened while they were not under control from that cause was attributable to it as a direct and probable consequence. But had the plaintiff sued the contractors who negligently left open the ditch in the road into which the horses fell, there is nothing in the case to shew that the jury would not have been just as much at liberty to infer that their negligence was the proximate cause of the accident. Here, as in that case, the question was for the jury, and I think they have rightly treated the unguarded switch as the real cause.

Lastly, as regards the damages: The plaintiff's case in one aspect is the common law action of the servant against the master, and in such a case the amount of the damages is in the reasonable discretion of the jury, having regard to the principle on which they are required to be assessed in actions under the Fatal Accidents Act. The evidence, in my opinion, proves a cause of action as at common law. It is not said that the defendants have omitted to supply the best appliance known or the best one conceivable. It is found that the accident happened by reason of their neglect to provide for the safety of the train at the switch-

point by means of a well-known, cheap and simple appliance ordinarily used for that purpose. As was said by Lord Herschell in *Smith v. Baker*, [1891] A. C. 325, 362: "It is quite clear that the contract between employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances, and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk." *Smith v. Baker*, was discussed and followed in the recent case of *Williams v. Birmingham Battery and Metal Co.*, [1899] 2 Q. B. 338, at p. 343, where it is said by the Court of Appeal: "When proper appliances have been supplied by a master to a man they may well become unsafe to the knowledge of the man and without the knowledge of the master, and so it is that each issue must in such a case be established by the man when he sues his master. This is the case of no proper appliances having been supplied by the master at all, so that the man might carry on his operation in such a way as not to be exposed to unnecessary risk."

Judgment.

OSLER,  
J.A.

Every word of this applies to the case at bar. The defendants knew that a safeguard was usual and proper, that it was, indeed, necessary to the safe management of the switch, but they did not supply it. They have not raised the defence, and I suppose refrained from pressing the question at the trial because there was no evidence to support it, that the deceased consented or undertook to run the risk of the switch being unguarded.

On the whole it seems to me that we should dismiss the appeal.

As to *Green's* case: The only point in which this case differs from *Rombough's*, is as to the damages. *Quære*, whether they are not under the circumstances excessive, almost, indeed, extravagant. The evidence does not justify the jury in finding as much as even \$1,000. I am willing, however, to concur with my brothers in reducing the verdict to that amount, if the plaintiffs will accept it, otherwise a new trial.

Judgment. Moss, J. A. :—

Moss,  
J.A.

The defendants contended that the accident was due to the running of the train at the excessive rate of speed, that it was the proximate cause. But I do not think this can be maintained. There is nothing to shew that if the switch had not been misplaced the train, even though moving at the rate of eighteen miles an hour, would not have passed safely over the line. Indeed, there is evidence that the gravel trains were being usually run over the Embrun bridge at that rate of speed. And any instructions to "run slow" that may have been given were with reference to the approaches to the bridge and not at all with reference to the switch.

There seems no reason for supposing that if the switch points had been properly placed and secured the accident or any accident would have happened. The contact with the misplaced point was the cause of the engine and cars leaving the rails and was the means by which the injury was inflicted.

The defendants' next contention was that all had been done that was required for securing the safety of the switch, that while it was true that if a switch lock had been used the lever would have been secured against displacement from the notch or slot except by a person having a key or maliciously breaking the lock, and that no such lock was used and no one was placed in charge to guard against misplacement, yet these precautions were not usual or necessary while the line was in course of construction, and they were never adopted until the line was completed and was being operated for use by the general public.

There is evidence that in some instances the contrary practice has been observed in the construction of railways in this country. But besides this it is shewn that in regard to this same siding the points of the switch at the north end were displaced in a similar way some months before the accident, and a train was derailed in consequence,

and that thereupon the defendants Balch and Peppard made demands upon the New York and Ottawa Railway Company to furnish them with switch locks. The defendants are thus shewn to have had their attention directed to the necessity for switch locks and the dangers resulting from the want of them.

Judgment.

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Moss,  
J.A.

The switch in question was between two villages or hamlets, the south switch stand being quite close to the highway along which the public travelled. The line of railway was not fenced at this point, and the switch was open to the public.

The testimony is direct that a switch lock or a man in charge would have safeguarded the lever in its position in the notch or slot. The gravel trains were passing and repassing this switch several times a day. What was Balch and Peppard's duty towards their employees going and returning upon these trains?

In the recent case of *Williams v. Birmingham Battery and Metal Co.*, [1899] 2 Q. B. 338, A. L. Smith, L.J., thus states it: "In the first place, there can be no doubt as to the duty of a master to his man, and I will take a passage on this subject from Lord Herschell's judgment in *Smith v. Baker* in the House of Lords. The noble Lord says: 'It is quite clear that the contract between employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances, and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk.' This being the master's duty towards his man, if the master knowingly does not perform it, it follows that he is guilty of negligence towards the man." See also *Citizens Light and Power Co. v. Lepitre* (1898), 29 S. C. R. 1.

In the present case the testimony and findings of the jury establish that the defendants by reason of their neglect of well-known and effectual precautions against the happening of what occurred were guilty of negligence which occasioned the accident.



**Judgment.**

Moss,  
J.A.

The case of *Williams v. Birmingham Battery and Metal Co.*, [1899] 2 Q. B. 338, also disposes of the objection, which was suggested rather than argued, that the deceased men were aware of the want of a switch lock, and must be taken to have agreed to accept the risk arising from its absence.

It was next contended as regards Rombough, that he was not properly on the gravel train at the time of the accident, that his place of employment was at the dump, that he had left there and had come down to Finch station when he should have remained at the dump, and that he was returning to his employment and was on the train when he should not have been, and that therefore the defendants were not responsible for his death.

Rombough was foreman of the cablemen, and his place of employment was ordinarily at the dump. He lived at Finch, and, going in the morning to the dump, would remain there until the last gravel train was returning in the evening, when he and his men would come in upon it.

Upon the day in question a gravel train drawn by Murray's engine came up to the dump between three and four o'clock in the afternoon. The men in charge of it reported that the engine of the other gravel train which should in ordinary course follow Murray's train to the dump had broken down, and it was the general impression and belief that there would be no other train up that evening. In these circumstances Rombough appears to have decided to return to Finch upon Murray's train, intending that if they met another train going to the dump to return with it and unload the cars as usual.

Accordingly he and his men returned with Murray to Finch. There they found the train with the disabled engine. Balch and Peppard's superintendent, Mr. Motley, directed Murray to attach his engine to the loaded cars and take them up to the dump. Rombough got upon the train to return to the dump with other men, and it was while on this trip that the accident occurred. There can

be no doubt that he was returning to assist in unloading the cars at the dump, and that he was therefore rightfully on the train. It was not unreasonable for him to act as he did under the circumstances. Upon the information received about the disabled engine and the prospect of no other train that evening he had presented to him the question whether he should remain and take the chance of another train coming up or whether he should do as he did, go down on Murray's train, intending to return in case another train was going up. He was some seventeen or eighteen miles away from his home and with no means of getting back that night in case of no other train coming up, and the men under him were in the like plight. It was not a case, as the defendants argued, of his quitting his work without reasonable excuse, but the case of a man acting reasonably and prudently in view of the circumstances.

Judgment.

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Moss,  
J.A.

Green had not been at the dump that day, and it was conceded that he had been directed to go with the other men and was rightfully on the train.

The accident was due to the negligence of the defendants themselves in not taking all reasonable precautions for the safety of their workmen passing over the line, and the case seems to fall within the principle affirmed in *Brydon v. Stewart* (1855), 2 Macq. 30, in which Lord Cranworth said (p. 36): "But whatever the man does in the course of his master's employ, according to the fair interpretation of these words, *cundo*, *morando*, *redeundo*, the master is responsible." And again (p. 38): "In my opinion, it is quite clear, by the law of England, and by the law of Scotland, that the injury happened to this man from the neglect of his master, while he was sustaining the character of master towards him."

It was consented to that this question should be determined by the trial Judge instead of being left to the jury, and I think that he came to the proper conclusion upon the evidence.

The remaining question is as to the amount of damages.

Judgment.

Moss,  
J.A.

The defendants' liability does not rest upon the Workmen's Compensation for Injuries Act, but upon the common law, and therefore the limit laid down by the Act does not apply.

But the jury in awarding damages is to be guided by what has been laid down in cases under the Fatal Injuries Act.

Applying the well-known standards in such cases, there seems to be no reason for saying that the damages awarded in *Rombough's* case are at all excessive, having regard to the relationship and number of the persons dependent upon him and the loss of benefit to them arising or likely to arise from his death.

But the position in *Green's* case is not the same. His is the case of a young man, unmarried, and living at times away from the home of his father and mother, in whose behalf alone the action is maintained.

He contributed occasionally towards his parents' maintenance in the shape of provisions and small sums of money, and he had been in the habit of paying \$24 a year interest upon a mortgage over a small property, the conveyance of which stood in his mother's name.

It is plain that in the case of parents suing in respect of the death of their child there is not usually the same expectation of pecuniary benefit from his life as in the case of widow and children suing in respect of the death of husband and father.

In *Blackley v. Toronto R. W. Co.* (unreported),\* a case of

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\*BLACKLEY V. TORONTO RAILWAY COMPANY.

THIS was an action to recover damages for the death of the plaintiff's son, and the majority of the Court of Appeal held, on the 2nd of March, 1897, that the deceased had been guilty of contributory negligence, and dismissed the action. OSLER, J. A., dissented, holding that the defence of contributory negligence had not been made out, and he then dealt with the question of the plaintiff's pecuniary interest, as follows :—

The next point is whether there was evidence of a reasonable probability or expectation of pecuniary benefit or advantage to the plaintiff from the continuance of the life of the deceased ?

This is the gloss which has been placed by the decisions, beginning

a father suing in respect of the death of his son, my brother Osler, after a review of the authorities, sums up the matter thus: "The only working rule, therefore, having regard to the other propositions established in respect of the action, is that laid down in <i>Pym v. Great Northern R. W. Co.</i> (1862), 2 B. & S. 759, viz., that it is for the tribunal to say under all the circumstances, taking into account all the uncertainties and contingencies of the particular case,	Judgment <hr/> Moss, J.A.
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with *Blake v. Midland R. W. Co.* (1852), 18 Q. B. 93, and *Pym v. Great Northern R. W. Co.* (1863), 4 B. & S. 396, upon the language of the Act, which speaks merely of the person whose neglect or default has caused the death being liable to an action "for damages" at the suit or on the behalf of certain specified relatives.

Damages of a merely nominal character are not sufficient to maintain the action. Nor can they be based upon the mental suffering of the parent for the loss of his child. They are confined to a loss in respect of some benefit arising or likely to arise out of the relationship of the parties admitting of a pecuniary estimate.

These propositions appear to be settled law, but there is sometimes a difficulty in determining what may properly be regarded as pecuniary damages within the Act as judicially expounded.

There is no comprehensive definition of what alone will constitute such damages. On the one hand they are not given as a solatium, and on the other not *merely* in reference to the loss by the death, of some legal right, *e. g.*, an annuity depending on the life of the deceased, because they are distributable among relatives only and not to all persons sustaining such a loss. They are to be calculated in reference to a reasonable expectation of pecuniary benefit as of right or otherwise from the continuance of the life: *Franklin v. South-Eastern R. W. Co.* (1858), 3 H. & N. 211. The only working rule, therefore, having regard to the other propositions established in respect of the action, is that laid down in *Pym v. Great Northern R. W. Co.* (1862), 2 B. & S. 759, viz., that it is for the tribunal to say "under all the circumstances, taking into account all the uncertainties and contingencies of the particular case, whether there was such a reasonable and well founded expectation of pecuniary benefit as can be estimated in money, and so become the subject of damages."

It has not been decided by any case by which we are bound that there must be evidence of pecuniary advantage derived from the deceased, previous to or at the time of his death. On the contrary, in *Franklin v. South-Eastern R. W. Co.*, it is said by the Court: "We do not say that it was necessary that actual benefit should have been derived; a reasonable expectation is enough; and such reasonable expectation may well exist, though from the father not being in need, the son had never done anything for him." See also *Dalton v. South-Eastern R. W.*



Judgment. whether there was such a reasonable and well founded expectation of pecuniary benefit as can be estimated in money and so become the subject of damages. It has not been decided by any case by which we are bound that there must be evidence of pecuniary advantage derived from the deceased, previous to or at the time of his death \* \* a reasonable expectation is enough."

Moss,  
J.A.

There is upon the evidence in this case quite sufficient

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*Co.* (1858), 4 C. B. N. S. 296 ; *Duckworth v. Johnson* (1859), 4 H. & N. 653 ; and *Bramall v. Lees* (1857), 29 L. T. 111.

The circumstances of the present case are of a somewhat unusual character. The deceased at the time of his death was a young man of between nineteen and twenty years of age. He was not contributing and never had in any way contributed towards his father's means. He was, on the contrary, then, and, had he lived, probably would for some time have continued to be, a source of expense. He was a law student, and had completed about three and a half years of the usual term of five years required in the case of a student who is not a graduate of some university. The plaintiff carried on the business of an accountant, and the deceased was the eldest of a family of nine children. The evidence of pecuniary damage was thus stated by the plaintiff: "Before he entered law, when he proposed going into law, I had a talk with him ; there was such a large family, I could not afford to spend so much money on him, and he said any money I expended on him he would pay it all back when he got through. On that understanding he went on with his studies. He would pay back all moneys expended on him and moneys given. It was simply to be regarded as a debt when he was able to pay it after he got through his law course." The plaintiff said that this was a reasonable arrangement in view of his duty to the other members of his family ; that it was frequently adverted to by the deceased, who was a young man of ability, getting on with his studies, and likely to succeed in his profession, and the plaintiff had no doubt that if the deceased had lived he would have repaid him every dollar he had spent upon him. The plaintiff's evidence was corroborated on the main point by one of his daughters, and it appeared that he had kept in a rough way an account of the moneys he had thus expended upon his son. The evidence in the second trial may be said to be somewhat expanded on this point, but there is nothing further, unless it may be with regard to the disposition and character of the deceased as tending to strengthen the probability that he would recognize the moral obligation he had thus assumed.

Upon the best consideration I have been able to give to this question, I am of opinion, agreeing in this respect with my learned brother Street in the Court below, that there was, under the circumstances I have mentioned, sufficient evidence of pecuniary damage.

I have called the son's obligation a moral obligation ; it seems clear that

to justify a reasonable expectation of pecuniary benefit in the future capable of being estimated. But the sum awarded seems beyond what reasonably should be estimated as the loss of benefit under all the circumstances of the case, and I think it ought to be reduced to \$1,000, otherwise there should be a new trial.

If the plaintiffs accept the reduced verdict the appeal will be dismissed with costs, otherwise a new trial, the costs of the former trial and this appeal to be disposed of by the trial Judge.

Judgment.

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Moss,  
J.A.

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it was nothing else, and that both father and son must have so regarded it, and not as something which in course of time would mature into a legal debt upon which an action might be maintained by the father against the son. Can it be said that the father had not a reasonable expectation of pecuniary benefit arising from the continuance of the son's life in the probability that the latter, from good feeling and filial affection, would feel bound to make good, as far as his means would admit, the moneys his father had expended upon him under the circumstances I have mentioned? Or, if the case be put strictly upon the ground of a contract by the son to recoup his father's expenditure upon him as soon as he was able to do so after he had gained his profession, a contract on which, of course, there was no right of action at the time of the death, how does it differ from that of the family of an annuitant when the life is lost on which the annuity hung? In the one the promise, in the other the covenant, is put an end to as regards the future payment by the death, and the principle on which the pecuniary damage results from the death and its nature are the same in both cases. *Quicumque viâ*, therefore, whether there was merely a moral obligation on the son's part or a binding promise (that he might possibly have pleaded infancy is not material), I am of opinion that there was that reasonable expectation of pecuniary advantage which is sufficient to maintain the action.

I refer to the judgment of my learned brother Rose in the case of *Lett v. St. Lawrence and Ottawa R. W. Co.* (1884), 11 A. R., at p. 36, and to *Rowley v. London and North Western R. W. Co.* (1873), L. R. 8 Exch. 221. The Irish cases cited in the argument I have read and considered, but in so far as what I have said may not be in accordance with them, they appear to me opposed to English authority: *Lett v. St. Lawrence and Ottawa R. W. Co.*, p. 27.

Something was said in the argument as to the measure of damages. I do not think that is before us at present. I will only say that, owing to the clear limitation of the maximum of the plaintiff's claim, it cannot be so elastic as it is often necessarily held to be. It may be less, having regard to all possible contingencies, but I do not see how it can possibly be more, than what the plaintiff can prove to have been his expenditure.

**Judgment.**      The appeal in the *Rombough* case should be dismissed  
Moss,      with costs.  
J.A.

MACLENNAN, and LISTER, JJ.A., concurred.

*In Rombough's case, appeal dismissed.*  
*In Green's case, new trial ordered unless*  
*damages reduced.*

R. S. C.

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IN RE TOWN OF CORNWALL AND CORNWALL WATER  
WORKS COMPANY.

*Municipal Corporations—Waterworks Company—Arbitration and Award*  
*—Payment into Court—Interest.*

Where a municipal corporation taking over the works of a waterworks company under the statutory arbitration procedure wishes to take advantage of the provisions of secs. 445 and 446 of the Municipal Act, it must pay into Court the amount awarded with interest to the date of payment in, and six months' interest in advance.  
Judgment of STREET, J., 30 O. R. 81, affirmed.

**Statement.**      THIS was an appeal by the town of Cornwall from the judgment of STREET, J., reported 30 O. R. 81, and was argued before OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 12th and 13th of October, 1899. The facts are stated in the report below.

*S. H. Blake, Q. C., and Leitch, Q. C., for the appellants.*  
*Aylesworth, Q. C., and C. H. Cline, for the respondents*  
*the company.*

*Bruce, Q. C., for the respondents, the mortgagees.*

January 16th, 1900. The judgment of the Court was delivered by

Moss, J. A. :—

Judgment.

Moss,  
J.A.

Several important and interesting questions were discussed upon the argument of this appeal, amongst others, whether the arbitration proceedings and award taken and made without notice to the holders of a mortgage upon the company's works and property, given by the company to secure payment of bonds issued by the company, and without such holders being parties to the proceedings, are binding upon them, and whether the town has failed to make payment of the amount awarded so as to entitle the company to resume possession of the works and property under sec. 103 of R. S. O. (1887) ch. 164, now sec. 64 of R. S. O. ch. 199. But in the view I take it is not necessary to determine these questions, for I think the orders appealed from should be sustained upon one of the other grounds.

The town having taken proceedings under sec. 101 of R.S.O. (1887) ch. 164, without first submitting to the rate-payers under section 98 the question of the expediency of acquiring the works of the company, the proceedings went on under the arbitration provisions of the Municipal Act, subject to the provisions of chapter 164. Section 99 of the latter Act directs the arbitrators as to the mode of determining the amount to be paid for the works and property, and provides that the sums so ascertained "the arbitrators shall award as the amount to be paid by the corporation to the company, with interest from the date of the award."

Observing these provisions the arbitrators awarded and determined "the sum of \$86,491.73 as the amount to be paid by the town to the company with interest from the date of this our award for the said works and property."

This statement in the award is followed by a declaration that the said sum is the amount to be paid for the said works and property, free and clear of all incumbrances whatsoever affecting the same, and a direction authorizing the town to make deduction, and withhold payment to the company, of amounts due or to accrue in respect of incumbrances not surrendered.



Judgment.

Moss,  
J.A.

There is nothing in either of the Acts under which the arbitrators were proceeding expressly authorizing them to insert such a provision in their award, but its presence in the award is, no doubt, explained by the fact that at an early stage of the arbitration proceedings it was objected before the arbitrators that there were outstanding bonds or debentures, and a mortgage to secure their payment covering the works and property, and that the incumbrancers were not parties to or notified of the arbitration proceedings.

The award having been made, the town council, treating it as valid and conclusive, proceeded to submit to the vote of the ratepayers a by-law for raising the amount required to pay the amount of the award, and, the ratepayers having assented thereto, it was finally passed as required by section 101.

The position then was that the town was entitled to take possession of the works and property as against the company and was bound to pay, within six months from the date of the award, the sum of \$86,491.73, together with interest from the date of the award.

The town proceeded to take possession against the will of the company on the 14th of July, 1897, and has ever since been in possession of, and in receipt of the income and revenue derived from, the works and property.

Owing to the incumbrancers not being parties to the arbitration the town found itself in a difficulty in regard to making payment of the amount awarded, and it proceeded to endeavour to solve the difficulty by paying, on the 13th of July, 1897, the sum of \$87,032.01, being, as it is said, the \$86,491.73 with interest thereon from the date of the award, into the Ontario Bank at Cornwall to the joint credit of the company and of the Farmers' Loan & Trust Co. of the city of New York, the mortgagees for the benefit of the bondholders, and notifying these parties of their having done so.

This was neither a compliance with the declaration and direction with regard to encumbrances contained in the

award, nor an adoption of the course prescribed by the arbitration provisions of the Municipal Act, which the town subsequently resorted to.

Judgment.

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Moss,  
J.A.

If the case as to payment was to be regarded as one between purchaser and vendor there was a purchaser in possession and receipt of profits and a vendor entitled by statute to interest until receipt of the purchase money. It may well be doubted whether under such circumstances the mere placing of the money in the bank, in the way in which it was done, could excuse the town from liability for interest until actual receipt by the parties entitled.

See this question discussed in *In re Riley to Streetfield* (1886), 34 Ch. D. 386, and *In re Dingman and Hall's Contract* (1890), 17 A. R. 398.

But the money was not permitted to remain as placed in the bank.

In the action of the company against the town, brought to recover back the possession of the property and works, the town relied, amongst other defences, upon the payment into the bank. At the trial of that action Street, J., dealing with that branch of the case, said: "The deposit in the bank at Cornwall has not been adopted by either of the parties to whose credit it was paid; and, in order to save further question about it, I will include in the present judgment a declaration that it is the property of the town corporation and should be paid to them free from any claims by either the plaintiffs or the trust company."

The formal judgment issued in the action contained a declaration to the above effect and a direction for payment of the money to the town. Upon the footing of that judgment the town took the money out of the bank, thus acquiescing in and acting upon the judgment. These proceedings seem to me to conclude the town on the argument that the deposit in the bank should be treated as a payment by the town of the amount of the award, so as to disentitle the company to interest from the date of the deposit, even if the case could be dealt with on the footing

Judgment.

Moss,  
J.A.

of vendor and purchaser. The result was to place the money back in the hands of the town and to restore all parties to the same position as if it had never been paid into the bank.

The town then, having the money in its hands and the difficulties with the company and the incumbrancers being still unadjusted, sought relief under the provisions of secs. 445 and 446 of the Municipal Act, and on the 12th of July, 1898, applied *ex parte* to Robertson, J., for, and obtained, an order that it be at liberty forthwith to pay into the office of the accountant of the Supreme Court of Judicature the sum of \$86,491.73, being the amount awarded as compensation or damage for the water works and property used in connection therewith by the award made on the 5th day of June, 1897, together with interest thereon for six months. The order also directed the town to deliver to the accountant at the time of such payment an authentic copy of the award, and contained directions for publication of a notice to claimants pursuant to section 446.

The town thereupon paid into the office of the accountant the sum of \$89,086.48, being the \$86,491.73 awarded and \$2,594.75, six months' interest at 6 per cent., and delivered to the accountant a copy of the award, and proceeded to publish the notice as directed by the order.

The effect of the order and the proceedings to be taken after payment of the money into the office of the accountant is, as declared by section 446, that the award shall thereafter be deemed the title of the town to the property and works, and the judgment with respect to claims against the money paid in shall forever bar all claims upon the property and works as well as any mortgage or incumbrances upon the same.

The order, if allowed to stand as made, would have deprived the company and its incumbrancers of the interest upon the sum of \$86,491.73 from the date of the award until the day of payment into the office of the accountant, although both the statute and the award give interest from the date of the award. The order did not even provide for payment of interest on the \$86,491.73 from the date of

the award to the 13th of July, 1897, when the payment into the bank was made. It made no provision for interest except the six months' interest for the future provided for by section 446.

Judgment.

Moss,  
J.A.

On motions by the company and the incumbrancers to rescind the order, Street, J., decided, amongst other things, that the amount paid in fell short of what should have been paid to the extent, amongst other things, of the interest on the amount awarded for the works and property, and I agree with him that the interest formed as much part of the compensation as the principal sum awarded.

Section 99 of R. S. O. (1887) ch. 164, gives the company interest from the date of the award, and the award, following the statute, adjudged interest from the date of the award. These formed the compensation to be paid into the office of the accountant under sec. 446 of the Municipal Act. No case has been made for relieving the town from payment of the interest, more particularly in view of the fact that it has been in possession of the property since July 13th, 1897.

On this ground alone the *ex parte* order could not be allowed to stand, and Street, J., made a very favourable provision for enabling the town to rectify the order in that respect. But that was not accepted by the town, and the orders issued were for rescission of the *ex parte* order and for enabling the town to withdraw the amount paid into the accountant's office.

The appeal from these orders should, I think, be dismissed, without reference to the other objections to the *ex parte* order which were argued before us.

It appears that there is an action now pending between the parties to this appeal in which these questions will properly come up for decision, and it is much better that they should be determined in a properly framed action than upon this *quasi* interlocutory proceeding.

*Appeal dismissed.*

R. S. C.



IN RE CANADIAN PACIFIC RAILWAY COMPANY AND CITY  
OF TORONTO.

*Landlord and Tenant—Agreement for Lease—Covenant to Pay Taxes—  
Evidence—Judicial Discretion.*

Upon a reference to settle the form of a lease, under a contract by a municipal corporation to demise land owned by it to a railway company for a long term of years with perpetual right of renewal, evidence of surrounding circumstances and the practice and usage of conveyancers is admissible to enable the Referee to decide whether the lease should contain a covenant by the lessee to pay municipal taxes.

Judgment of ARMOUR, C.J., affirmed.

Upon such a reference the Referee is entitled to rule as to the evidence to be admitted, and he should not be ordered to admit, subject to objection, all evidence which may be tendered.

**Statement.**

APPEAL by the company from the judgment of ARMOUR, C. J.

The following statement of facts is taken from the judgment of MACLENNAN, J. A.:—

The question in this appeal is whether upon a reference to settle a lease, pursuant to a contract between the parties, evidence is admissible to establish that the lease ought to contain a covenant on the part of the lessees, the railway company, to pay taxes. The learned referee decided that the evidence was admissible, and his ruling was affirmed by ARMOUR, C. J., on appeal.

There are two contracts between the parties, the first dated the 26th of July, 1892, and the other the 4th of February, 1895; and they deal with a great many different matters besides the lease in question. Among other things, the railway company is to convey to the city absolutely all its interest in certain defined parcels of land, and the city is to demise to the railway company certain other lands, called the "alternative site," that is, a site in the city of Toronto "for its station ground, tracks, and appurtenances." The city's contract is in the following terms: The city "covenants and agrees to demise and lease the alternative site to the Canadian Pacific, for successive terms of fifty years each, during all time to come. The rental for the first term of fifty years shall be \$11,000

per annum, and the rental for each subsequent term of fifty years shall at each renewal be increased by \$2,750 per annum, and all rent shall be payable on the 3rd days of July, October, January and April, of each year. For the first quarter a proportionate amount to be paid, having regard to the time of possession under the said lease." Statement.

The second agreement, paragraph 2, provides that the first term of fifty years is to commence on the 1st day of January, 1895. Paragraph 3 defines more particularly what is to be included in the alternative site. Paragraph 4 provides for an adjustment of rents to the commencement of the lease. Paragraphs 11 and 13 provide for leases to the company by the city for successive terms of twenty-one years in perpetuity, at the expiration of existing leases, of other parcels of land, at rents to be settled by arbitration; and paragraph 12 stipulates for the delivery of an abstract of title to the alternative site, and for its approval within a month after delivery.

The appeal was argued before BURTON, C. J. O., OSLER, MACLENNAN, MOSS, and LISTER, JJ. A., on the 14th and 15th of November, 1899.

*Aylesworth, Q. C., Angus MacMurchy, and Shirley Denison*, for the appellants. The agreement in question, as appears from its terms, covers very many subjects of negotiation, not only between the parties to this litigation, but also between one or both of them and the Grand Trunk Railway Company. It was intended, as appears on its face, to be a settlement of many matters in dispute between all three parties, and involved the surrender by the appellants to the respondents of a large tract of land designated as the "original site," which had been acquired by the appellants, and the acquisition by the respondents of another large tract, designated as the "alternative site," and an agreement by the respondents to lease this "alternative site" to the

**Argument.** appellants in perpetuity in the manner therein provided. The agreement was the culmination of an enormous mass of correspondence, and of extremely numerous interviews, between the officials of the parties interested, and its terms were arrived at as a measure of compromise, and intended to be in all respects final, and statutes were passed, confirming and establishing the agreement. Notwithstanding all this, it is now claimed by the respondents that this agreement does not contain all the terms of the contract between the parties, and that the liability of the appellants to covenant in the lease to pay taxes, depends not upon an interpretation of the agreement, but upon evidence of something which occurred during the protracted and complicated negotiations which led up to the agreement. Such a contention, it is submitted, is entirely contrary to the rule against the admission of parol evidence, and it is difficult to imagine a stronger case for its application. It would be impossible to confine such evidence to any one point, but the whole negotiations would necessarily have to be reviewed, not only in order to ascertain the correctness of the respondents' contention, but also to ascertain whether instead of something being omitted which it was intended to insert, it was not merely an abandonment by one party, tacit or expressed, of certain claims, made in order to procure a corresponding abandonment by the other. It is also submitted that this discussion, if it resulted in a reformation of the document, which would be its effect if the respondents' contention is correct, would require the presence of the Grand Trunk Railway Company, who are parties to the agreement, but not parties to the reference. The present application does not involve the question whether a covenant to pay taxes should be inserted in the lease or not. In the future it may or may not be held as a matter of law, or as a matter of the interpretation of the agreement, that such a covenant should be inserted, but the only question in this appeal is whether any extrinsic evidence in support of such a contention can be received. It is submitted that

the cases relied on by the respondents, such as *Church v. Brown* (1808), 15 Ves. 258; *Hampshire v. Wickens* (1878), 7 Ch. D. 555, and *Strelley v. Pearson* (1880), 15 Ch. D. 113, do not support this contention. These are cases in which there was a bare agreement for a lease, while in the present instance the agreement covers a multitude of other topics, is made between parties other than the present litigants, and is manifestly a settlement of numerous disputes between all three. All the agreements dealt with in the cases cited, contained the provision that "usual" or "proper" covenants should be inserted, thus leaving it to the Court to ascertain what such covenants were. In this case, however, no similar words occur, and it is a case *sui generis*. The cases cited, therefore, are not authority for the proposition that evidence should be received in this case. It is a very different thing to agree to give a lease, such as the present, upon certain specific terms, making no provision for "usual" or "proper" covenants, and to agree to give a lease which shall contain "usual" or "proper" covenants, in addition to the terms specifically provided for in the agreement. The agreement contains no provision that the appellants shall pay taxes, and it has been decided in Ontario that in such a case the tenant, if he pays the taxes, may deduct them from the rent, and in England the rule is the same as to the land tax, which is a landlord's tax unless the tenant agrees to pay it. In this case, therefore, if effect were given to the respondents' contention, parol evidence would be admissible to entirely alter the legal effect of the present agreement. A lease is just as effective if it is simply a demise of lands, although it contains no covenant whatever other than a covenant to pay rent (which is provided for by the agreement). It is open to the parties to limit the scope of the covenants into which they will enter, and it would not affect the validity of the lease if any one or more of the covenants usually found therein were not provided for by the agreement. The agreement in question is essentially one of this nature, as the parties were mutually abandoning claims and fixing



**Argument.** liabilities, and terms favourable to the respondents in another part of the agreement might well have been the consideration for their abandonment of any covenant which would otherwise be usual, and upon which they might otherwise have insisted. There is, therefore, no reason for assuming that a provision for "usual" or "proper" covenants should be read into the agreement, and for basing upon such an assumption the right to give extrinsic evidence of what such usual covenants are : see Woodfall, 16th ed., p. 128 ; 2 Prideaux, 17th ed., p. 11 ; 1 Platt on Leases, p. 640 ; 5 Davidson, part 2, p. 51 ; *Preston v. Merceau* (1779), 2 Wm. Bl. 1249 ; *Rich v. Jackson* (1794), 4 Bro. C. C. 513, and 6 Ves. 333 (n.) ; *Davies v. Fitton* (1842), 2 Dr. & W. 225 ; Article, 27 Solicitors' Journal, p. 129.

*Robinson, Q.C., and Fullerton, Q.C.,* for the respondents. Many facts and circumstances have been referred to by the appellants which are not admitted, but disputed by the respondents, and this case must be decided as if all that existed between the parties was simply an agreement for a lease which it was contemplated would be subsequently executed. It is clear that if an agreement for a lease does not say what covenants are to be in the lease, that the usual covenants are to be inserted therein. What covenants are usual covenants is a matter of evidence, and the surrounding circumstances may be looked to for the purpose of determining what are such usual covenants and what should be the terms of such lease : 3 Bythewood, 4th ed., p. 117 ; Foa's L. & T., 2nd ed., pp. 149, 168, 291 ; *Bennett v. Womack* (1828), 3 C. & P. 96 ; 7 B. & C. 627 ; *Propert v. Parker* (1832), 3 M. & K. 280. The respondents are at liberty to shew what covenants are usual in leases of the character of this particular lease, and that a covenant to pay taxes is always inserted therein. The evidence proposed to be offered is not evidence contradicting or varying the agreement, but such evidence as may be proper and necessary to aid in its construction. Such a lease must contain some covenants, and what these

covenants should be cannot be ascertained except by a **Argument.** knowledge of the facts and circumstances. It is unnecessary at this stage to specify what evidence should be admitted, and the referee's discretion should not be fettered.

*Aylesworth*, in reply.

January 16th, 1900. The judgment of the Court was delivered by

MACLENNAN, J.A. (after stating the facts):—

There seems to be nothing else in the agreements material to the present question. There is a contract for a lease, renewable in perpetuity, in successive terms of fifty years, at an agreed rent, payable on named days; and the agreement is silent as to what, if any, covenants on the part of either lessors or lessees are to be inserted therein. Now the law is clear that when such a lease comes to be settled the parties are entitled to have *some* covenants inserted. That was hardly disputed in argument; and, indeed, in the drafts of the proposed lease brought in by both parties covenants are contained. In some of the reported cases the contract has expressly provided that the lease shall contain the usual conditions and covenants. But in *Church v. Brown* (1808), 15 Ves. 258, Lord Eldon decided that it made no difference whether the agreement contained a clause that usual covenants should be inserted or not, and that in either case the meaning of the parties to a contract for a lease was that there should be proper covenants, which would include usual covenants: pp. 265, 272, 273. In *Propert v. Parker* (1832), 3 M. & K. 280, Sir John Leach, M.R., said: "There being in the agreement no stipulation as to covenants, the defendant has a right to a lease containing only usual covenants." That statement of the law is adopted by all the best text writers, without question, and I do not find any doubt thrown upon it anywhere. See also *Hodgkinson v. Crowe* (1875), L. R. 19 Eq. 591, and *S. C.*, in appeal, L. R. 10 Ch. 622; *In*

Judgment. *re Lander and Bagley's Contract*, [1892] 3 Ch. 41. The  
MACLENNAN, parties, then, being entitled respectively to all proper and  
J.A. usual covenants, the question arises, how is it to be  
ascertained in any particular case what covenants are  
usual and proper? In *Church v. Brown*, p. 265, Lord  
Eldon said that the law implied what the proper covenants  
were, and he referred, pp. 263 and 273, to the analogous  
case of an agreement for sale, saying that it was perfectly  
settled by the law, what were the covenants to be entered  
into by a *vendor*, under different circumstances. The  
decision in that case was that a proviso for re-entry in case  
of assignment without license or in case of bankruptcy  
was not a proper or usual stipulation, and the Lord  
Chancellor does not indicate what covenants or provisoes  
were usual and proper. In *Hampshire v. Wickens* (1878),  
7 Ch. D. 555, Jessel, M.R., refers to *Church v. Brown*, and  
makes these observations: "Usual covenants may vary in  
different generations. The law declares what are usual  
covenants, according to the then knowledge of mankind."  
\* \* Now what is well-known at one time may not be  
well-known at another time, so that you cannot say that  
usual covenants never change. I have, therefore, looked at  
the last edition of Davidson's *Precedents in Conveyancing*  
to see whether the usage is said to have changed." And he  
then quotes from that well-known work, where the  
author says the result of the authorities includes among  
usual covenants on the part of the lessee a covenant "to pay  
taxes, except such as are expressly payable by the landlord."  
Now, while the covenant under discussion before the Master  
of the Rolls in that case was not in relation to the payment  
of taxes, I think it is clear that in the opinion of that eminent  
Judge a covenant on the part of the lessee to pay taxes  
was a usual and proper covenant, and that the statement in  
Mr. Davidson's book was very good evidence of what were  
then regarded by conveyancers as usual and proper  
covenants. *Strelley v. Pearson* (1880), 15 Ch. D. 113, is  
another case which was relied on. In that case the contract  
was for a mining lease, and it was contended that it ought

to contain a proviso enabling the lessee to determine it, in the event of its being impossible to work the mines at a profit. Evidence was adduced on both sides upon the question whether such a proviso was a usual clause. Fry, J., decided that he could not upon the evidence come to the conclusion that such a clause was usual, but that the contrary was the fact. If evidence on the question was inadmissible it could not have escaped the attention of a Judge of such large experience as Mr. Justice Fry, and it would have settled the question. He says, however, that the burden of proof that such a proviso was usual rested upon him who asserted it.

Judgment.  


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 MACLENNAN,  
 J.A.

It has been made a question whether what are usual covenants is one of fact or of law: see Woodfall, 16th ed., p. 131. There is reason and sense in the suggestion there made, that what is usual must in every case be a question of fact, to be decided upon evidence if either party so require. Although Lord Eldon says that the law implies what the covenants are to be, he also says that if he could see a usage with reference to the peculiar subject of the demise authorizing the insertion of the covenant he might say the party had contracted for it, but no such fact was made out. With the exception of some decisions by Lord Romilly, in which he assumed to decide as matter of law, or settled usage, that certain covenants were or were not usual, the later cases decide that the question is one of fact. In *Hampshire v. Wickens* (1878), 7 Ch. D. 555, Jessel, M.R., said that the decision in *Hodgkinson v. Crowe* (1875), L. R. 19 Eq. 591, was conclusive against any judge being allowed to say from his own view that a particular covenant should be inserted. *Hart v. Hart* (1881), 18 Ch. D. 670, was a contract for a separation deed to contain usual covenants, and Kay, J., received evidence of the practice of conveyancers, as to whether a particular covenant was usual.

There is, therefore, clear authority that the question is to be determined by evidence, and that the practice of conveyancers may be shewn, either orally, or by reference to



Judgment. the standard books on conveyancing. I do not understand  
MACLENNAN, J.A., Jessel, M.R., as intimating that because forms of leases are  
found in the books, containing certain covenants on the  
part of lessors and lessees respectively, that alone is  
sufficient. His reference is to the statement of the author  
that certain covenants are usual. In none of the decided  
cases did the question relate to the covenant to pay taxes,  
and I cannot help thinking that the reason for that is that  
it was in all those cases conceded that it was a usual  
covenant.

In Platt on Covenants, a book which is constantly  
cited, published in 1829, the author states, p. 211: "It  
is the ordinary usage for the tenant to covenant to  
pay all taxes, rates and assessments, except land tax." In  
Bythewood and Jarman's Precedents, 3rd ed. (1840), vol. 4,  
p. 308, after a long discussion, it is said: "It need scarcely  
be observed that usual covenants include a covenant by  
the tenant to pay taxes, except the landlord's tax; that is,  
the tax expressly charged on him." In Prideaux on  
Conveyancing, a book which has gone through seventeen  
editions, the latest being of 1899, beginning in the 4th  
ed., 1864, which is the earliest I have seen, the same  
statement is repeated, that a covenant on the part of  
the lessee to pay taxes is a usual one. So also Dart's  
Vendor and Purchaser, 2nd ed. (1852), p. 85, and *ib.*, 4th  
ed. (1871), p. 153; also Davidson, 2nd ed. (1864), vol.  
5, pp. 1, 49, and Davidson and Wadsworth's Precedents  
(1899), p. 362. See also Woodfall, 15th ed. (1893), p.  
128, and 16th ed. (1898), p. 129, where it is said that  
the better opinion appears to be that among usual  
covenants must be reckoned a covenant by the tenant to  
pay taxes, except such as are usually payable by the  
landlord. See also a very full discussion of the subject at  
pp. 129, 142, 159, and 177, of vol. 27, Solicitors' Journal,  
and in Stroud's Judicial Dictionary, title "Usual," to both  
of which Mr. Aylesworth very fairly called our attention,  
although I think they make against his contention.

I am, therefore, of opinion that there is a large body of

admissible evidence to be found in the books on conveying which have been in use for many years. But, on the other hand, lessees may, if they think fit, meet that evidence by other evidence. The lease which has been contracted for is one with perpetual renewal, at a ground rent which has been fixed by the contract, and is for a special purpose. They may be able to shew that in this country it is not usual for the lessee, in such leases, to covenant to pay taxes, or that having regard to the special purpose of this lease, no such covenant should be inserted. The whole question is for the referee to decide.

Judgment.  
MACLENNAN,  
J.A.

The learned Chief Justice, in the order which is complained of, directed that the referee should hear all the evidence offered by any of the parties, subject to objection, and should determine whether, and if so what, covenants should be inserted in the lease, and should set out in his report whether he decided upon the construction of the agreement or upon the evidence, and if so, upon which, or if partly on one and partly on the other. Counsel for the respondents had not in the Court below asked for any such variation of the certificate of the referee, and did not before us strive to uphold it. We think this special direction to the referee cannot be upheld. It is in effect a variation of the original order of reference of the 7th of April, 1896, which was made by consent; and it limits the powers of the referee in the conduct of the reference in a manner which we think is not authorized. While, therefore, we dismiss the appeal, the order of the learned Chief Justice should be varied, and should be limited to the dismissal of the appeal from the certificate of the referee.

*Appeal dismissed.*

R. S. C.

## GUTHRIE v. CANADIAN PACIFIC R. W. Co.

*Prescription—Right of Way—Railways—Crossing.*

When a line of railway severs a farm, and no crossing is provided by the company, a right of way across the line may be acquired by the owner of the farm by prescription.

A farm crossing, provided by a railway company, may be used by any person who, after the severance, becomes the owner of portions of the farm on both sides of the line of railway, and has a right of access to the crossing.

A right of way may be acquired, although the dominant tenement is not contiguous to the servient tenement.

Judgment of BOYD, C., affirmed.

**Statement.** APPEAL by the defendants from the judgment at the trial.

The plaintiff David Guthrie was the owner, and the plaintiff John D. Guthrie was the tenant and occupant, of a farm in the township of North Dumfries, in the county of Waterloo, described as all that part of the north half of lot number thirty-three, in the eighth concession of that township, lying north-west of the defendants' line of railway. They contended that, under the circumstances explained in the judgment, they were entitled to a right of way under the defendants' line of railway at a point in lot thirty-four, where the line by means of a trestle bridge was carried across a ravine, and they claimed a mandatory injunction to compel the defendants, who had filled in the ravine, to reopen the way.

The action was tried at Berlin on the 1st of November, 1898, before BOYD, C., who on the 10th of November, 1898, gave judgment in the plaintiffs' favour.

The appeal was argued before BURTON, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, JJ. A., on the 15th and 16th of November, 1899.

*Wallace Nesbitt*, Q. C., and *Angus MacMurchy*, for the appellants. The plaintiffs are not entitled to the right of way claimed. The main contention is that the right has been acquired by prescription, but in the first place the

evidence does not bear that out, and in the second place Argument.  
 a prescriptive right could not be acquired at all under the  
 circumstances of this case. A railway company cannot  
 deal as it pleases with its lands, but has merely the limited  
 right to convey such portions as are found to be unneces-  
 sary for the purposes of the undertaking, the protection  
 of public rights being the foundation of the doctrine.  
 For this reason an adverse right which may interfere with  
 the working of the railway cannot be acquired by prescrip-  
 tion: *In re Metropolitan District R. W. Co. and Cosh* (1880),  
 13 Ch. D. 607; *Mulliner v. Midland R. W. Co.* (1879), 11  
 Ch. D. 611; *Rosenberg v. Cook* (1881), 8 Q. B. D. 162; *Ayr*  
*Harbour Trustees v. Oswald* (1883), 8 App. Cas. 623; *Ware*  
*v. London, Brighton and South Coast R. W. Co.* (1882), 52  
 L. J. Ch. 198, 47 L. T. N. S. 541; *Sapp v. Northern Central*  
*R. W. Co.* (1878), 51 Md. 115; *Grand Junction Canal Co.*  
*v. Petty* (1888), 21 Q. B. D. 273; *Attorney-General v.*  
*Teddington Urban District Council*, [1898] 1 Ch. 66; and  
 see 51 Vict. ch. 29, sec. 90 (c) (D.). This is, moreover,  
 an attempt to support an easement in gross, and such an  
 easement is invalid: *Bailey v. Stephens* (1862), 12 C. B.  
 N. S. 91. It is not appurtenant to the plaintiffs' land,  
 and *Thorpe v. Brumfitt* (1873), L. R. 8 Ch. 650, relied on in  
 support of the contention that it is, is quite a different  
 case. If there was ever any right it was lost by the  
 severance of the interests: *Midland R. W. Co. v. Gribble*,  
 [1895] 2 Ch. 129. This is not a crossing within the mean-  
 ing of the Railway Act.

*Guthrie*, Q. C., and *Shepley*, Q. C., for the respondents.  
 Not only does the evidence shew that the right of way  
 has existed for the prescriptive period, but also that it  
 existed long before the railway was built. That being  
 so, all the elaborate argument as to the impossibility of  
 acquiring by prescription an adverse right against a rail-  
 way company is beside the question. The right being in  
 existence the company was bound to expropriate it or to  
 respect it, and that liability still exists. But even if the  
 case is treated strictly as one of prescription against the rail-



**Argument.** way company the plaintiffs must succeed. Clearly the railway company could grant a crossing, and the right which they can grant can be acquired as against them by prescription, and there is ample evidence here to make out the user for the necessary period : *Kerr v. Coghill* (1877), 25 Gr. 179 ; *Israel v. Leith* (1890), 20 O. R. 361. The right of way is essential to the use and enjoyment of the plaintiffs' land, and is clearly appurtenant to it. At any rate the plaintiffs are entitled under the Railway Act to the right now claimed.

*Nesbitt*, in reply.

January 16th, 1900. The judgment of the Court was delivered by

MACLENNAN, J. A.:—

The plaintiffs rested their case mainly on the Prescription Act. In order to succeed on that ground, they must make out actual enjoyment of the way by them, and those under whom they claim, as of right, and without interruption, for the full period of twenty years next before the commencement of the action, which was upon the 30th of July, 1898 : R. S. O. ch. 133, secs. 35 and 37. There was an interruption in fact in the beginning of September, 1897, but not having been acquiesced in for a year, and the action being brought within that time, there was no interruption within the meaning of the statute : *Goddard*, 1st ed., pp. 197, 237. It is, therefore, sufficient if the period of enjoyment is carried back to the 30th of July, 1878.

Before that time, viz., on the 17th of November, 1877, the plaintiff David Guthrie had become the owner in fee simple of the north half of lot thirty-two, and the north half of lot thirty-three, in respect of which the easement is claimed, and the evidence is undisputed, that from that time till the interruption already mentioned, the way had been actually used and enjoyed by him and his tenants as of right, and as appurtenant to the said lands.

The plaintiff's conveyance is made in pursuance of the Short Forms Act, and it reserves "the land sold or agreed to be sold to the Credit Valley Railroad Company." Judgment.  
MACLENNAN,  
J.A.

The late Dr. McGeorge had been at the time of his death, some time in 1861 or 1862, the owner of the north half of lots thirty-two and thirty-three, and also of the north half of lot thirty-four; and by a deed poll dated the 1st of July, 1874, made by two only of the three executors of the McGeorge estate, those executors covenanted with the Credit Valley Railway Company, to sell for the price of \$50 per acre, "so much of the said three half lots as might be selected from time to time for the purposes of the railway, four rods in width, and also such other widths as may be required for the roadbed and slopes, berms, spoilbanks, and materials for embankment or ballasting, across or upon my (*sic*) lands and premises." The deed poll also gave the company the right to enter upon the lands, and to lay out and construct the railway as might be required.

In the same year the company took possession, prepared their plans and profiles, built a trestle bridge over the way or crossing now in question, and between 1877 and 1878 laid down the rails. The line selected runs across the three parcels, the north halves of lots thirty-two, thirty-three and thirty-four, severing each of them into two parts, and the parts of lots thirty-two and thirty-three, thus agreed to be sold by the executors of McGeorge to the railway company, and occupied by them, are no doubt what was reserved in the plaintiff's purchase deed.

The deed poll of the 1st of July, 1874, having been made by two only of the three executors and trustees for sale of the McGeorge estate, was probably of no effect whatever, as a contract of sale of the land: Lewin on Trusts, 10th ed., p. 278; 1 Williams on Executors, 9th ed., p. 820 *et seq.* But the company having taken possession, and having built their line, must be regarded as in possession, from the beginning, in exercise of their statutory powers.

Judgment. After the railway company thus took possession, and  
MACLENNAN, constructed the trestle bridge, the three executors, on the  
J.A. 20th of January, 1876, sold and conveyed the three parcels, excepting the land agreed to be sold to the railway company, to four of the children of their testator, and it is those children of the testator, who, on the 17th of November, 1877, sold and conveyed to the plaintiff David Guthrie; and it is proved that from the time the railway company took possession the McGeorge executors, and their grantees, continued to use the way in question as of right, and as a way appurtenant to their lands, for the purpose of crossing the railway, to and fro, until the conveyance to the plaintiff. There was only one dwelling house, with several farm buildings, on the three parcels, and they were all situate upon the north half of lot thirty-three, on the north side of the railway; and before the advent of the railway, and as far back as 1843, the owners of the three parcels, and their tenants, went and came to and from the neighbouring village of Ayr, by a defined road, of which that now claimed formed a part, but which, until the railway company took possession, was, of course, part of their own freehold. When this road or lane leading to the village, reached the southern limit of lot thirty-four, it connected with a lane, nearly a chain wide and more than half a mile long, expressly purchased in 1843 by the then owner of the half lots in question, to give him a direct road to the village. This lane belonged to McGeorge in his lifetime, and to his executors, and the use of it is expressly granted in the plaintiff's chain of title.

Shortly before the conveyance to the plaintiff, that is, on the 22nd September, 1877, the plaintiff's vendors, the children of McGeorge, had contracted with him and one David Smith, by one instrument, for the sale of the north half of lot thirty-four to Smith, and the north halves of lots thirty-two and thirty-three to the plaintiff, with the exception of the land sold to the railway company, and the conveyance to Smith was made on the same day as that to the plaintiff; therefore, when the conveyance to the plaintiff was executed, the subway in question, including the lane just

mentioned, was a way appurtenant to the plaintiff's land, and used therewith, as well as to and with that conveyed to Smith. Whether Smith could or could not, for want of some exception or reservation in his deed, have objected to the plaintiff's use of that part of the road leading from lot thirty-three to the subway, which passes over the land conveyed to him, neither he nor those claiming under him have ever done so : *Wheelodon v. Burrows* (1879), 12 Ch. D. 31 ; *Goddard on Easements*, 3rd ed., p. 172 ; and I think it is immaterial, for it is not necessary that a dominant and servient tenement should abut upon, or lie adjacent to, each other. One proprietor, for example, may have a right of way to a well, over the lands of several intervening proprietors. Unless, therefore, the railway company is in a different position from any other owner of land, in respect to the law of easements, I think it clear that the plaintiff has made out his title to the easement in question by prescription, and is entitled to our judgment in this appeal. The railway company's title depended upon the deed poll or agreement of sale of the 1st of July, 1874, until 1881, when they obtained a conveyance from the surviving executor of McGeorge. It was contended that the period of prescription could only commence from the date of that conveyance. I think there is nothing in that contention. If the deed poll was valid as a contract of sale of the land, the company were legal owners, in fee simple, from the time they took possession and constructed their line, subject only to the payment of purchase money. If the contract was invalid, having taken possession, their seizin, such as it was, was in fee simple, and so continued until they obtained their conveyance : *Asher v. Whitlock* (1865), L. R. 1 Q. B. 1.

It was also contended, that the defendants, having acquired the land for the purposes authorized by their Act of incorporation, could make no conveyance of it, and that *a fortiori* no easement could be acquired over it or any part of it and that the series of decisions beginning with *Rochdale Canal Co. v. Radcliffe* (1852), 18 Q. B. 287, and ending with *Ayr Harbour Trustees v. Oswald* (1883), 8 App. Cas. 623, was applicable. I think, however, those

Judgment.  
MACLENNAN,  
J.A.



Judgment. cases are inapplicable to the present. The way in question  
**MACLENNAN,** was and is a farm crossing, rendered proper and necessary  
J.A. by the severance of the lands of the McGeorge estate. The company's Act of incorporation makes them subject to the Consol. Statutes of Canada ch. 66, which was then the Provincial Railway Act, of which sec. 13 makes it proper for, and even obligatory upon, companies to provide farm crossings of the road, that is, of the railway, for the use of the proprietors of the lands adjoining the railway. The way in question, therefore, is one which it was entirely within the power of the company to grant; indeed counsel for the company frankly admitted that the company could have acquired the land for the line, either by conveyance or by expropriation proceedings, subject to the easement in question, and if so, I see no reason why a grant might not be presumed in order to support a prescriptive title.

While I think the plaintiff can support his judgment on the ground of prescription, I think it may be supported on another ground equally firm and conclusive. The Railway Act, Consol. Statutes, ch. 66, sec. 13, just referred to, made it obligatory on the company to provide a farm crossing for the McGeorge executors, upon whose land they had built their line, severing the northern from the southern portion. The company understood that obligation, and carried it out. The profile of the line shews an extensive ravine at this point, all of which was to be filled up to grade, except sixty feet, the site of the road in question, which was to be bridged with a trestle and arches; and that is the way in which the work was done. If the company had not made this crossing, or some other suitable one, an action would have lain against them for damages. The duty of the company has been held to be, without delay, and even without request, to make a sufficient crossing; and it may be either by a subway, or an overhead bridge, or at grade: *Reist v. Grand Trunk R. W. Co.* (1857), 6 C. P. 421; *S. C.*, (1858), 15 U. C. R. 355; and *Burke v. Grand Trunk R. W. Co.* (1857), 6 C. P. 484. In *Brown v. Toronto and Nipissing R. W. Co.* (1876), 26 C. P. 206, it was held by Galt, C.J., that the change from the word "and" to the word "at" in

consolidating the old Railway Act, 14 & 15 Vict. ch. 51, sec. 13, relieved companies from the obligation to provide farm crossings; but that was overruled by *Canada Southern R. W. Co. v. Clouse* (1886), 13 S. C. R. 139.

Judgment.

MACLENNAN,  
J.A.

Now, the north halves of all three lots, thirty-two, thirty-three, and thirty-four, having been owned by the McGeorge executors, when the severance took place, and when the farm crossing was provided, it became the crossing for the three lots and enured to the benefit of all three,—a way appurtenant to all three and every part of them; and nothing can be clearer than that as long as any owner of land north of the line continues to own any of the land south of the line which has been severed by its construction, so long is the company bound to permit the use of the crossing. The plaintiff has sold to Hall the part of lot thirty-three south of the line. I do not know whether he still retains lot thirty-two on either or both sides; but it is clear he still retains his right to use the lane on the south side already mentioned from which his land north of the line was severed thereby. And if it is necessary, as to which I express no opinion, that he should retain some land on both sides, in order to entitle him to use the crossing, I think his right to use the lane is a sufficient interest on the south side, for that purpose. I am, therefore, of opinion that the plaintiff is entitled to maintain his judgment in respect of the easement, as a statutory farm crossing.

A point was also made by the appellants of a deed made in 1884 or 1885 by the plaintiff to one Hall, in which, by a mistake, which was soon afterwards corrected, he conveyed to Hall the part of the lane extending from the railway to the south half of the lot, instead of merely giving a right to use it. It was said that this was an interruption, whereby the plaintiff had lost his right to use the subway. In my opinion there is nothing in this objection, for the use of the subway itself was never thereby for a moment interrupted.

For these reasons I think the appeal should be dismissed.

*Appeal dismissed.*

R. S. C.

## COUNTY OF YORK V. ROLLS.

*Water and Watercourses—Flood—Change in Course of Stream—Riparian Right.*

When, owing to an extraordinary flood, a stream suddenly changes its course and washes away part of the land of a riparian proprietor, he is entitled, at any time before a prescriptive right, or right by estoppel, to keep the stream in its new channel is acquired against him, to fill in the places washed away and to turn the stream back to its original channel.

Judgment of MACMAHON, J., affirmed.

**Statement.** APPEAL by the plaintiffs from the judgment at the trial.

The defendants, Rolls and Hunter, were the executors of the estate of the late Charles Rolls, and the defendant Rolls was also, under his will, tenant for life of the land in question. The action was brought to restrain the defendants from filling in what was alleged to be a part of the channel of the River Don, near a bridge erected by, and the property of, the plaintiffs, across that river where it crosses Yonge street at the north-east quarter of lot number ten in the first concession west of Yonge street, in the township of York.

The action was tried at Toronto on the 4th of October, 1898, before MACMAHON, J. At the conclusion of the trial the learned Judge dismissed the action as against the defendant Hunter, and made certain findings of fact, upon which, on the 28th of December, 1898, he gave judgment dismissing the action also as against the defendant Rolls, the findings and judgment being as follows:—

MACMAHON, J. :—

The action must be dismissed as against the defendant Hunter. I am satisfied from the evidence that whatever was done, was done by the defendant Rolls as owner of the life estate in the lands of his testator, and that he was in no way dealing for or on behalf of the estate of which

he was joint executor with Hunter. Hunter was not dealing for or on behalf of the estate in any way. He was not asked to make the estate liable for the cost of the work, nor was he asked by his co-executor to join him in doing any act that he was doing. His costs must be paid by the plaintiffs.

Now, dealing with some of the facts in the case: Robert Barron, in 1878, was the owner of a piece of land that jutted into the River Don. By an unusual flood on the 14th of September of that year, the piece so jutting was carried away, and no effort was made to restore the property to its original position until a short time prior to the time when the plaintiff corporation contemplated building a new bridge on Yonge street, crossing the River Don. The flood that destroyed the property is spoken of by Mr. Gibson, who was an eye witness, and who was at the time connected officially with the township, as being a flood of a very unusual character, carrying away not only that piece of land, but the mill dam to the east of it at what was known as Hogg's Mills. After the flood in 1878, a bridge was built on Yonge street, crossing the River Don. This bridge, with its approaches, was about 220 feet long, and consisted of a succession of trestles, in spans of about 16 feet each. When it was proposed to repair the bridge in 1897, it was deemed advisable by the county engineer to substitute one span of a hundred feet, and that mode was adopted by him as being safer than a succession of small spans with the longer approach. The evidence shews that that was deemed a more satisfactory way of spanning the river, as it gave a greater unrestricted flow to the water through the bridge. What was brought out somewhat prominently during the evidence was that the north abutment of the bridge would have given a wider and better flow, and would not have been nearly so close to Rolls' land had it been placed on the site of the abutment of the former bridge and about twelve feet north. If any trouble was to be apprehended from what is called "scouring" during the

Judgment.  
MACMAHON,  
J.



**Judgment.** high water, it was to be apprehended in some measure from the abutment not being placed where the former one was, but being placed further into the bed of the stream, and where the water during the freshets would have more effect upon it.

MACMAHON,  
J.

Yonge street, formerly a toll road, owned by the county of York, was on the 6th of February, 1896, transferred to the township of York, under the authority conferred by sec. 566, sub-sec. 7, of the Consolidated Municipal Act of 1892. Under the by-law by which this transfer was effected, all the bridges on any of the roads mentioned in the by-law were to remain the property of and to be maintained by the county.

Barron conveyed the land in question to Charles Rolls on the 11th of February, 1882.

When it was contemplated by the county council of York, in 1897, to replace the former bridge by a new structure, the solicitor for the executors of the Rolls estate wrote to the county clerk protesting against their narrowing the course of the River Don and diverting it in such a manner. An intimation is also given in the letter that the owner of the life estate intended filling in the lands to the original line. And he, in 1897, built crib work on the lines to which the land extended prior to its being swept away by the freshet in 1878; and he was filling in the crib work when the plaintiff corporation obtained an injunction restraining him from proceeding with the work.

If by a sudden irruption of its waters a river forms an entirely new channel in private lands, the right to the soil thus covered remains in the owners: Gould on Waters, 2nd ed., sec. 159. "The owner of land, bounding upon an inland stream, may repair and restore the banks, when broken, but cannot make different ones. So long as his operations tend only to confine the waters within their original channel, he is not responsible for damage to neighbouring proprietors": *ibid*, sec. 160.

Barron, while owner of the land, might have built a

protecting wall on the sides or around the tongue of land and so have protected it from injury or destruction by floods: *Pierce v. Kinney* (1869), 59 Barb. 56. And those deriving title through Barron, so long as they did so within the time prescribed, were entitled to reclaim the land covered by water and restore the banks, as Rolls was attempting to do in the present instance: *Farquharson v. Farquharson* (1741), cited in *Menzies v. Breadalbane* (1828), 3 Bli. N. S. 421; *Pierce v. Kinney* (1869), 59 Barb., at p. 59.

Judgment.  


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 MACMAHON,  
 J.

The allegations in the statement of claim forming the foundation for the relief sought by the plaintiffs are: That the filling in by the defendants of that portion of the River Don will narrow the channel and course of the river and will cause the water to rise and become much deeper than if the stream proceeded in its natural course and without any obstruction, and will in all probability overflow Yonge street and private properties north and west of the bridge and will wash away the approaches to the bridge on the north side thereof. And also that such filling-in will cause the ice floating down the river to accumulate and form a jam and by raising the water will involve danger to the approaches at the north end of the bridge and to the bridge itself.

In the foregoing observations I have endeavoured to deal with the rights of the defendants.

The plaintiffs have caused an excessive narrowing of the Don river where the new bridge is erected, and by placing the north abutment 12 feet to the south of the position occupied by the north abutment of the old bridge, both the depth and velocity of the river have been greatly increased at its north bend. The danger said by some of the witnesses to be apprehended was the scouring of the north abutment by the current. But that danger, if it in fact exists, would, according to the evidence of a consulting engineer called by the plaintiffs, have been greatly diminished had the north abutment been placed 12 feet further north. The channel of the river between the end of the defendants' land and the abutment would have been 48 feet, while it is now only 36 feet in width.

Judgment.  
MACMAHON,  
J.

There is no prescriptive right in the plaintiffs to have the river flow in the particular channel they have created by the alteration and narrowing of the old channel caused by (amongst other things) the building of the abutments to the new bridge. The defendants had a right to turn it back and confine it to its former channel: *Tuthill v. Scott* (1871), 43 Vt. 525.

There must be judgment for the defendants dismissing the action and dissolving the injunction with costs.

The appeal was argued before BURTON, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 20th of November, 1899.

*C. C. Robinson*, for the appellants. Assuming that a sudden change in the course of a stream does not affect the title, still the original condition cannot be restored if that restoration will injure some one else: *Whalley v. Lancashire and Yorkshire R. W. Co.* (1884), 13 Q. B. D. 131. The defendants have acquiesced in the changed state of affairs and cannot now recede from the position adopted: *Woodbury v. Short* (1845), 17 Vt. 387; *Ford v. Whitlock* (1855), 27 Vt. 265.

*William Cook*, for the respondent Rolls. There has not been any acquiescence; as soon as it was proposed to build a new bridge the right was insisted on. At most it is a question of prescription, and the defendants' rights have not been barred: *Pierce v. Kinney* (1869), 59 Barb. 56; *Tuthill v. Scott* (1871), 43 Vt. 525; *Slater v. Fox* (1875), 5 Hun 544. The case of *Whalley v. Lancashire and Yorkshire R. W. Co.* (1884), 13 Q. B. D. 131, has no application, for there the water had been collected by the person at fault.

*M. H. Ludwig*, for the respondent Hunter. The finding that the work in question was done by Rolls is supported by the evidence and should not be interfered with.

*Robinson*, in reply.

January 16th, 1900. OSLER, J. A. :—

Judgment.

OSLER,  
J.A.

The contention of the plaintiffs appears to be that by omitting for so long a time to reclaim his land and to restore the original bank of the river, the defendant Rolls has now lost the right to say that the part over which the river now flows is not part of the channel; that the defendant's private right has become extinguished or merged in some right of the public; or that the *medium filum* of the river as between the defendant and the opposite riparian proprietors, who are now the plaintiffs, must now be ascertained with regard to the present apparent width of the channel, or that by standing by, as it is said, and making no protest or objection when they rebuilt the bridge which had been washed away by the flood, he is estopped from now reclaiming his land, as the effect of his doing so would be to narrow the channel and thus possibly to jeopardize the piers of the bridge by increasing the speed and altering the course and depth of the current of the river at that place.

The Don, at the place in question, has never been a navigable stream. The plaintiffs have acquired no right under the statute of limitations even if they can be said by reason of their ownership of the bridge to be riparian proprietors. And unless they can establish something in the nature of acquiescence on the part of the defendant or those through whom he claims in the altered condition of things brought about by the flood of 1878, by reason of which the plaintiffs were induced to incur expenditure on the faith of the river being permitted to run in its new channel, and which would make it unjust on the defendants' part to restore the *status quo*, it is clear that they have no ground of action.

In Angell on Watercourses, 7th ed., sec. 333, it is said: "A riparian proprietor may legally erect any work in order to prevent his lands being overflowed by any change of the natural state of the river, and to prevent the old course of the river from being altered," citing *Rex v. Trafford* (1832),



Judgment. 1 B. & Ad. 874, 8 Bing. 204; *Farquharson v. Farquharson* (1741), 3 Bli. N. S., at pp. 421, 422; *Slater v. Fox* (1875), 5 Hun 544; the latter a case not unlike the present, though dealing with the restoration by or with the assent of the riparian owner of the bank of a navigable stream.

OSLER,  
J.A.

In Gould on Waters, 2nd ed., citing English and American authorities, it is said, section 159: "If an unnavigable stream, in which the title of the riparian owners extends *ad filum aquæ*, slowly and imperceptibly changes its course, the boundary line is at the centre of the new channel. But if the change is violent and visible, and arises from a known cause, such as a freshet, or a cut through which a new channel is formed, the original thread of the stream continues to mark the limits between the two estates." And in section 160: "The owner of land, bounding upon an inland stream, may repair and restore the banks, when broken, but cannot make different ones. So long as his operations tend only to confine the waters within their original channel, he is not responsible for damage to neighbouring proprietors, or to a highway." To the same effect is Washburn on Easements, 4th ed., sec. 47.

See also *Tuthill v. Scott* (1871), 43 Vt. 525, where the head note states the decision thus: "The owner of land, which is being inundated by a stream breaking away from its channel, may legally turn it back to its old channel, though he would have no right in preventing the inundation of his own land to cause it to flow on the land of another except in its old channel." And see *Pierce v. Kinney* (1869), 59 Barb. 56; Angell on Watercourses, 7th ed., sec. 334 and notes. In Blackstone's Com., book 2, ch. 16, Chitty's ed., note p. 208, dealing with the subjects of alluvion, dereliction, and avulsion, quoting from "the able treatise of Mr. Schultes on Aquatic Rights," pp. 136, 137, it is said: "As to unnavigable rivers there is a case cited in Callis (On Sewers) p. 51, from the 22 *Lib. Ass. pl.* 93, which establishes the law. The case was, that a river of water did run between two lordships; and the soil of one

side together with the river of water, did wholly belong to one of the said lordships; and the river by little and little did gather upon the soil of the other lord, but so slowly, that if one had fixed his eye a whole day thereon together, it could not be perceived. By this petty and unperceivable increase, the increasement was got to the owner of the river: but if the river by a sudden and unusual flood had gained hastily a great parcel of the other lord's ground, he should not thereby have lost the same."

Judgment.

OSLER,  
J.A.

See to the same effect note 1, at p. 50, Angell on Water-courses, 7th ed., sec. 53: "Where a stream changes its course by slow and imperceptible steps, the riparian proprietors are obliged to accept the consequent alteration in their boundaries; but where the shifting is sudden and well marked, the original *medium filum* continues to be the border line." See also Tyler on Boundaries (1874), ch. 4, p. 49.

The sole question, therefore, is whether the defendant has done anything, or whether his conduct or that of his predecessors has been such as, to make it inequitable that he should now reclaim his land by restraining the river to its former channel.

For this the plaintiffs rely upon the law as stated in Gould on Waters, sec. 159; *Ford v. Whitlock* (1855), 27 Vt. 265; *Woodbury v. Short* (1845), 17 Vt. 387. And no one will quarrel with the proposition if supported by the facts. The learned Judge's finding is against the plaintiffs on this point, and in my opinion there is no reason for disturbing it. The plaintiffs rebuilt the bridge soon after the flood, but so far as that bridge was concerned there is no evidence that its situation or mode of construction was induced or affected by the fact of the defendant's land having been washed away, or that such new bridge could have been injuriously affected by the restoration of the original boundary of the river had it then been restored.

The new bridge which the plaintiffs proposed to build

**Judgment.**

**OSLER,  
J.A.**

shortly before the defendant began to reclaim his land and restore the bank, is one of very different character from the former in length of span and position of the piers and abutments opposite the defendant's property, and the plaintiffs, in May, 1897, before they began to build, had the most distinct warning that the mode of construction they then proposed to adopt would be likely, by increasing the span of the bridge, altering the position of the piers, and to some extent also diverting the course of the river, to injuriously affect his right, which he then very plainly stated to the plaintiffs, to restore the bank of the river to its former line.

For these reasons I think the judgment of my brother MacMahon at the trial was right, and that the appeal should be dismissed with costs.

Moss, J.A. :—

It seems to be admitted that the effect of the filling in by the defendant is to cast the waters towards the northern abutment, and the fear is expressed that in time of freshets it may do so to such an extent as to endanger the foundation of the abutment.

But upon the evidence there is no pretence that there has been any alteration of the stream or its course as it existed prior to September, 1878.

The plaintiffs in their pleading make no reference to the condition of things before September, 1878, but treat the defendants as trespassers placing, without any colour of right, an obstruction in the stream so as to alter its course and interfere with the plaintiffs' proposed new bridge.

The defendant Rolls sets up the condition of things prior to 1878 and claims that what he did was done merely to restore that condition and that nothing has been done beyond ; and the defendant Hunter denies all participation in the acts complained of.

The plaintiffs by their pleadings make no case of acquiescence or prescriptive right.

The defendants have proved the facts to be as alleged in their defence, and the question is whether they form a defence in law to the plaintiffs' claim for an injunction.

Judgment.

Moss,  
J.A.

If, immediately after the freshet and before the plaintiffs had built the trestle bridge, Barron had proposed to restore his land to its former condition, his right to do so would have been unquestionable. The plaintiffs could not have restrained him from so doing on the ground that it might interfere with the position of their proposed trestle bridge. The defendant's *prima facie* right would, therefore, appear to be to restore the river bank to its former condition, and thus reclaim his land. No prescriptive right had accrued in the plaintiffs' favour.

But the plaintiffs take the ground that, having been permitted to build their trestle bridge without objection or opposition from Barron, and it having been continued in its then condition until 1897, the defendants ought not to be permitted to now disturb the *status quo*. This case is not made by the pleadings, and the claim to be entitled to compel the defendant to preserve it might present a more reasonable aspect if the plaintiffs themselves desired to continue the *status quo*. But the plaintiffs have not been content to continue the former condition of things—they have themselves altered the bed and course of the stream as it existed from 1878. If there was an established course created in 1878, it could be no more interfered with by the plaintiffs than the defendants. The plaintiffs, however, have not left that course unaltered and cannot now have it preserved unaltered even if the defendants are enjoined.

The plaintiffs' argument, therefore, that the defendants are estopped from denying that the course of the stream is otherwise than as it has been since 1878, is met by the fact that the plaintiffs have by their action estopped themselves from asserting the existence of an established course created by the freshet of 1878. The matter being thus at large, the question is one of fact as to where the old channel of the river was before the freshet of 1878.



Judgment.

MOSS,  
J.A.

By the terms of the conveyances, under which the defendants claim, their land extended to the stream.

By the sudden and unusual flood in September, 1878, the stream gained hastily the parcel in question, but it was not thereby wholly lost to the proprietor: Blackstone's Com., Lewis's ed., vol. 2, p. 262 and notes.

The work done and proposed to be done by the defendant Rolls tends only to confine the waters within their original channel and the plaintiffs have failed to shew that the work goes beyond the restoration of the old channel at the point in question.

If the plaintiffs are correct in supposing that the result of restoring the ancient channel is that the water of the stream may at certain times be cast over against the northern abutment of the plaintiffs' bridge, they have themselves contributed to bring about the result by placing the abutment 12 feet south of the site of the trestle bridge and thus narrowing the original waterway at this point.

I would affirm the judgment of the trial Judge.

BURTON, C. J. O., MACLENNAN, and LISTER, JJ. A., concurred.

*Appeal dismissed.*

R. S. C.

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## IN RE LONDON STREET RAILWAY COMPANY ASSESSMENT.

*Assessment and Taxes—Street Railway—Rails, Poles and Wires—Bridges—Road-bed—Adding Items on Appeal.*

Although a street railway is operated as a continuous system through all the wards of a city, the portion of the rails, poles and wires, in each ward, must be assessed in that ward, and in making the assessment the rails, poles and wires, must be treated as material situate in the ward and not as necessary portions of a going concern operated in several wards.

Bridges built and used by a street railway as part of their system are subject to assessment but must be assessed in the same way as the rails, poles and wires.

*Consumer's Gas Co. v. Toronto* (1897), 27 S. C. R. 453; *In re Bell Telephone Company Assessment* (1898), 25 A. R. 351; and *In re Toronto Railway Company Assessment* (1898), 25 A. R. 135, applied.

Upon an appeal to the Board of County Judges from the Court of Revision coming on for hearing, the board, at the request of the city, and without any previous notice or assessment or application to the Court of Revision, added to the items of assessable property of a railway company, a certain amount as the value of the portion of the streets of the city "occupied" by the company:—

*Held*, that the Board of County Judges had no jurisdiction to make this addition, the amendment made by sec. 5 of 62 Vict. ch. 27 (O.), not then being in force.

Judgment of the Board of County Judges reversed.

THIS was an appeal by the company from the judgment Statement.  
of the board of County Judges, and was argued before  
OSLER, MACLENNAN, MOSS, and LISTER, JJ. A., on the 29th  
of November, 1899.

*I. F. Hellmuth*, for the appellants.

*T. G. Meredith*, for the respondents.

January 16th, 1900. The judgment of the Court, in which the facts are stated, and the authorities relied on dealt with, was delivered by

MOSS, J. A.:—

This is an appeal by the London Street Railway Company, under section 84 (6) of the Assessment Act, from the judgment or decision of a board of County Judges composed of the Senior Judge of the County of Elgin, the Senior Judge

**Judgment.** of the County of Middlesex, and the Judge of the County of Oxford, upon an appeal from the court of revision of the City of London, which confirmed an assessment upon the property of the railway company.

**Moss.**  
**J.A.**

The first complaint is in respect of the amount of the assessment upon the rails, poles, and wires, of the company in the different wards of the city.

The amounts as confirmed by the Court of Revision were:—

In Ward No. One.....	\$ 18,060
In Ward No. Two.....	32,690
In Ward No. Three.....	11,830
In Ward No. Four.....	25,690
In Ward No. Five.....	26,040
In Ward No. Six.....	22,470

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Making in all the sum of..... \$136,780

The majority of the board of judges reduced this sum to \$108,000, apportioned amongst the various wards.

The Judge of the County of Oxford dissented, being of the opinion that the amount should be reduced to \$21,000.

The railway company contends that it should not be fixed with an assessment of more than \$21,000.

The next complaint is in respect of an assessment upon certain bridges, the property of the company, used as part of its line. The amounts, as confirmed by the court of revision, were

In Ward No. One.....	\$ 4,150
In Ward No. Two.....	6,600
In Ward No. Three.....	2,160
In Ward No. Four.....	6,310

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Making in all the sum of..... \$19,220

The majority of the board reduced this sum to \$9,000 apportioned amongst the several wards.

The Judge of the County of Oxford dissented, being of the opinion that the amount should be reduced to \$3,000.

The railway company contends that the bridges are not assessable, but if assessable, not for more than \$3,000.

Judgment.

Moss,  
J.A.

The last complaint is in respect of the action of the board in ordering the assessment against the company to be amended by adding thereto an assessment of \$33,000 for land, being portions of various streets of the city occupied by the railway.

No assessment was made or notice of assessment given by the city to the company in respect of this land nor was any amendment of the assessment as originally made and notified to the company asked from or made by the court of revision.

But while the appeal was before the board, the city's assessment commissioner was called as a witness by the city, and put in and proved a statement of valuation made by him while the appeal proceedings were going on before the board, of the portions of the streets occupied by the rails and structures of the railway company's line.

The total valuation was \$132,494 apportioned amongst the various wards, and upon this evidence the board added \$33,000 to the assessment of the company.

The railway company contends that the board acted without jurisdiction in assuming to amend the assessment by adding new items of property and making an assessment in respect of them, that if it had jurisdiction it should not have exercised it in the circumstances of the case, and that in any case the company is not assessable in respect of the items added by the board.

The first and second complaints again bring into prominence the practical difficulties which have been noticed in previous decisions in applying the provisions of the Assessment Act to specific kinds of property which, until a recent period, were never supposed to be within their scope and the assessment of which was probably never contemplated by the framers of the Act.

This was pointed out by my brother Osler in *In re Bell Telephone Company and City of Hamilton* (1898), 25 A. R. at p. 353, but although a session of the Legislature



Judgment.

Moss,  
J.A.

has since been held, no change has been made in the provisions of the Assessment Act, in the direction of removing these difficulties, and we must deal with them as best we can according to the existing law.

To begin with there are some points which must now be taken as settled by authority.

For many years following the decision of this Court in *Toronto Street R. W. Co. v. Fleming* (1875), 37 U. C. R. 116, the rails and roadbed of street railways were treated as exempt from taxation. The propriety of that decision was for the first time brought in question before the Supreme Court of Canada in *Consumers' Gas Co. v. Toronto* (1897), 27 S. C. R. 453. The majority of the Court held that *Fleming's* case had been wrongly determined and in *In re Toronto Railway Company Assessment* (1898), 25 A.R. 135, the majority of this Court held that it was bound to treat *Fleming's* case as overruled and that the rails, poles, and wires, of a street railway company, used in operating the railway, were subject to assessment under the Assessment Act as real property or estate.

Being real estate they must be assessed according to the directions of section 18, and therefore in the case of a city, in the ward in which the property lies.

In *Consumers' Gas Co. v. Toronto* (1895), 26 O. R. at p. 731, Boyd, C., expressed the opinion that the correct method of assessing or rating in such cases would be to value the concern as a whole and then to apportion ratably to the wards or the municipalities so much of the value as falls to that part of the concern territorially situate in each locality.

But this view did not meet with the approval of the Supreme Court. The Chief Justice of Canada said (p. 456): "I am, however, of opinion that the judgment of the Chancellor, except so much of it as relates to the mode of assessment, was right." And again (p. 458): "I agree with Mr. Justice Gwynne that the assessment ought to have been made as in the case of real estate and land generally, in the separate wards of the city." Mr. Justice Gwynne

said (p. 460): "The property in question being assessable as land, must be assessed in the several wards of the city." The other members of the Court concurred.

Judgment.

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Moss,  
J.A.

Therefore, however convenient it might be, or however much more satisfactory results might be obtained if the assessor was at liberty in making his assessment to adopt the view suggested by the learned Chancellor, it has been declared that that method is not sanctioned by the Assessment Act, and the provisions of the Act must be followed.

And for the mode of estimating the value of property for the purpose of assessment, recourse must also be had to the provisions of the Act.

Section 28 contains a plain direction to the assessor. With certain exceptions not applicable here, real and personal property shall be estimated at their actual cash value as they would be appraised in payment of a just debt from a solvent debtor.

Difficulties or apparent anomalies arising from the endeavour to apply the statutory rules to the assessment of such property as the rails, poles, wires, and bridges, of a street railway company, used in the operation of the railway, can furnish no reasons for not adhering to the statute.

Such property has been adjudged to be assessable as real property and as such to be assessable in the several wards of a city, and not by valuing the concern as a whole and apportioning ratably to the wards. The latter method must be excluded, and if difficulties and anomalies arise out of the application of the former method, it is not because the rules are not intelligible, but because of the necessity of accommodating them to property of a kind it was probably never contemplated they should be extended to.

In *In re Bell Telephone Company and City of Hamilton* is pointed out what appeared to this Court the only reasonable way of applying the statutory rules of assessment to property of this nature, and what is there said applies to this case.

In imposing the assessment of \$136,780 in respect of

Judgment.

Moss,  
J.A.

rails, poles, and wires, the city authorities evidently proceeded upon the view that in estimating the value they should treat the property as part of a going concern extending throughout the city and not as real property confined by wards.

The majority of the board have not stated the grounds upon which they reached the conclusion that the assessment ought to be fixed at \$108,000.

There is no evidence upon which that sum can be supported as forming the aggregate of values in the several wards, ascertained, as they should be, by determining the fair cash value, which could be had from a purchaser or from a creditor buying or taking over in payment of his debt the part situate in each ward, without reference to its connection with other property not within the ward.

There was evidence that as regards T rails, of which there are about 11,180 feet, or something more than two running miles, in the whole system, there is a second-hand value in the market, but as regards girder rails and much of the overhead construction there is not.

As to them the witnesses seemed to differ only as to the price to be obtained for them when dissociated from the going concern. Mr. Dunstan, one of the principal witnesses on behalf of the city, seems to concede that there is no middle course between an estimate of the whole concern and an estimate of the values when separated in each ward. The question was put to him: "Supposing I have to sell all the rails, poles and wires, and general construction, of the London Street Railway in Ward No. 1, to a person who has no right to use them in connection with any other ward in the city or operate a street railway, is it worth \$7,300 a mile to that person? A. Not to a person who cannot connect with the other wards. Q. If it is to be valued in that way we have got to take your value that way? A. Yes, as a scrap value. Q. You have got no other value? A. No."

He had made up an estimate of the value upon the latter basis, putting it at \$30,879.11, and there was a conflict of testimony as to the proper sum upon that basis. Had the board adopted Dunstan's figure it might possibly have stood. But the Judge of the County of Oxford, who alone appears to have dealt with the evidence upon the basis of the statutory rule, came to the conclusion that the proper sum to allow was \$21,000, and to that sum the assessment should be reduced. The parties having agreed upon the apportionment of the \$108,000 amongst the various wards can no doubt agree upon the apportionment of the lesser sum.

Judgment.

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 Moss,  
J. A.

The bridges which were the subject of assessment were constructed and are maintained by the railway company under clause 49 of the agreement and by-law set forth in the schedule to the Act, 59 Vict. ch. 105 (O.). The abutments on which the structures rest were constructed by the company in and upon the soil of the highways and they appear to be land, real property, or real estate, within the meaning of the seventh section of the Assessment Act, as construed by recent decisions. These abutments sustain the arches, girders, iron work, and timbers, of the superstructure and are as much part of the bridges as the superstructures. The whole forms a part of the continuous way upon which the company's cars pass and repass.

The bridges are, therefore, assessable according to the same principles as other assessable property. The fact that they are partly within one and partly within another ward cannot affect their assessability. The question is one of the value to be put upon the parts in the respective wards.

There is some evidence of the adaptability of the superstructures or parts of them to use in other bridge constructions, but not sufficient to sustain the amount awarded by the majority of the board. That amount seems to be not far from the cost price of the superstructures with a three years' 5 per cent. deduction for deterioration, but whether it was arrived at in that manner



Judgment.

Moss,  
J.A.

does not appear. Upon the whole evidence the amount arrived at by the Judge of the County of Oxford seems the more appropriate sum and the assessment ought to be reduced to \$3,000. Reference may be made to the following amongst other cases: *Hudson River Bridge Co. v. Patterson* (1878), 74 N.Y. 365; *Arnold v. Ruggles* (1837), 1 R. I. 165; *Meason's Estate* (1835), 4 Watts (Pa.) 341; *Sussex v. Strader* (1840), 3 Harrison (N. J.) 108; *Harrison v. Parker* (1805), 6 East 154, 8 R. R. 434; *Regina v. Blackfriars Bridge Co.* (1839), 9 A. & E. 828; and *Niagara Falls Suspension Bridge Co. v. Gardner* (1869), 29 U.C.R. 194.

The remaining question is as to the assessment upon the track allowances. What are track allowances, and how they are to be maintained, is defined and prescribed in clauses 6 and 7 of the agreement. The assessment commissioner's mode of dealing with them as assessable property of the company is somewhat startling and does not appear to have been adopted by the board.

But it is not necessary to consider whether an assessment of the surface of the streets of the city, outside and beyond the parts which are actually occupied by the rails and other structures, is, as at first sight it appears to be, an advance much beyond any decided case on the subject, or whether, if the company is to be assessed in respect of such portions of the streets, it should not be so assessed in connection with and as part of the assessment for rails, poles, and wires, for the action of the board in making the addition at the time it was made does not seem to have been within their powers.

At the time it was done no such power was possessed by the board as was possessed by the court of revision to reopen the whole question of the assessment.

No application had been made to the court of revision to reopen the assessment and the board was not sitting to hear an appeal from any action of the court of revision in respect of such an application.

Before the board the proceeding was wholly upon the

evidence of the assessment commissioner. The question was not thoroughly investigated, for no notice of intention to apply to the board to deal with it was given to the company.

Judgment.

Moss,  
J.A.

It was contended that under the amendment to the Assessment Act made by sec. 5 of 62 Vict. ch. 27 (O.), which came into force on the 1st of May, 1899, this Court has power upon this appeal to open up the whole question of and make the addition to the assessment.

But even if it was quite clear that this Court has now a discretion which might be exercised in this instance, although in respect of a matter upon which the board could not have exercised its discretion, yet in the circumstances of the case it would not be proper to do so, having regard to the material before the Court.

The appeal ought to be allowed, first, by reducing the assessment in respect of rails, poles and wires, to the sum of \$21,000.

Secondly, by reducing the assessment in respect of bridges to the sum of \$3,000, and

Thirdly, by disallowing the assessment of \$33,000 in respect of portions of the streets known as the track allowances.

The respondents should bear the costs of the appeal to the board of Judges and of this appeal.

*Appeal allowed.*

R. S. C.

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TOWNSHIPS OF ADELAIDE AND WARWICK V. TOWNSHIP  
OF METCALFE.

*Drainage Act—Amendment of Engineer's Report—Jurisdiction of Referee—  
Appeal—Court of Appeal—R. S. O. ch. 226, secs. 89, 90.*

The Drainage Referee cannot, under sec. 89 of the Drainage Act, R. S. O. ch. 226, upon the admission of the initiating township that the report appealed from is defective, refer it back, against the wishes of the appealing townships, to the engineer for amendment.

Judgment of the Drainage Referee reversed.

An order assuming to refer back a report is not an interlocutory order within the meaning of sec. 90 of the Drainage Act, R. S. O. ch. 226, and an appeal lies to the Court of Appeal against it.

**Statement.**

THIS was an appeal by the townships of Adelaide and Warwick, from an order of the Drainage Referee, and was argued before OSLER, MACLENNAN, MOSS, and LISTER, JJ. A., on the 6th of December, 1899.

*Aylesworth*, Q.C., for the appellants.

*J. Folinsbee*, for the respondents.

January 16th, 1900. The judgment of the Court, in which the short point involved is stated, was delivered by

LISTER, J.A.:—

This is an appeal by the townships of Adelaide and Warwick, from orders of the Drainage Referee made upon the application of the respondent township referring back to the engineer of the respondent township, the report, plans, specifications, assessments and estimates, made and prepared by him for the respondent township in respect of proposed repairs and improvements of the Hardy creek drain.

Upon the report of its engineer, the respondent township, under the authority of the Municipal Drainage Act, initiated a scheme for repairing and improving a drain known as "the Hardy creek drain."

The report found that certain lands in the appellant townships (being the higher or upper townships), would

be beneficially affected by the contemplated work, and such lands were thereby assessed for a proportion of the cost of the proposed work as for outlet liability. A copy of the report, etc., was duly served on the appellant townships, and they duly appealed to the Referee from such report, etc., upon the ground, amongst others :

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 LISTER,  
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“That all the lands and roads assessed for the said work in the townships of Adelaide and Warwick, are assessed for outlet liability, and the drain in question does not form an outlet for the waters from said lands within the meaning of the said Act, and the said work when completed will not, within the meaning of the said Act, form an outlet or improved outlet for the waters from off said lands, and the lands and roads in Adelaide and Warwick will not receive any benefit whatever from the construction of the said work.”

The hearing of the appeal was fixed by the Referee for the 20th of December, 1898, but was subsequently postponed by him to the 31st of January, 1899.

On the 25th of January, 1899, the Referee, on the application of counsel for the respondent township, made the order appealed against, the material portions of which are as follows :

“Upon the application of the above named respondents, and upon hearing read the proceedings, including the notices of appeal herein, and upon hearing what was alleged by counsel for the respective appellants and the said respondents, and upon the said respondents admitting that the said report, specifications and assessments and estimates appealed from, require amendment, and after having directed that the appellants and respondents should be notified not to subpoena witnesses or prepare for trial on the 31st day of January, instant, being the day fixed for trial, but that any witnesses subpoenaed should be stopped or prevented from attending trial :

It is ordered that the said report, plans, specifications, assessments, and estimates, appealed from herein, be referred back to the said engineer, W. M. Manigault, for



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review or amendment, as to him may seem proper, and that the same, when so amended, be served upon the respective appellants, or that the appellants' copies thereof be accordingly amended by the said engineer; and that the respective appellants have liberty at any time within thirty days after the service aforesaid, or other amendment of the said report, plans, specifications, assessments, and estimates, within which to amend their grounds of appeal, or put in such grounds of appeal as they may be advised, from the said report, plans, specifications, assessments, and estimates, as filed and served herein, if they so desire."

And by the same order he again postponed the hearing of the appeal to a day to be thereafter named by him; and from this order the appellants appeal, mainly upon the ground that the Referee had no jurisdiction to make the order. The appeals were, by order of the Referee, consolidated.

Clearly the order was intended to be an authorization to the engineer to amend his report by changing the assessment of the lands in the appellant townships from outlet to injuring or benefit liability, or both, and the question is, had he jurisdiction to make the order? I do not think he had. Sub-section 3 of section 89, which is the part of the Municipal Drainage Act relating to the amendment of engineers' reports made in respect of work initiated under the Act, provides that "the Referee shall have power, subject to appeal as hereinafter provided, to determine the validity of all petitions, resolutions, reports, provisional or other by-laws, whether objections thereto have been stated as grounds of appeal to him or not, and to amend and correct any provisional by-law in question; and, with the engineer's consent and upon evidence given, to amend the report in such manner as may be deemed just, and upon such terms as may be deemed proper for the protection of all parties interested \* \*."

In the absence of express legislative authority, the Referee has no power to refer back for amendment or

review a report made by an engineer in respect of a drainage work initiated under the Act. Jurisdiction is conferred upon the Referee, with the consent of the engineer, and upon evidence given, to amend a report. The Act contains no provision which authorizes the Referee to delegate this jurisdiction ; it must, therefore, be exercised by the Referee, and by him only.

**Judgment.**

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I cannot agree with the contention of the learned counsel for the respondent, that the order in question was interlocutory within the meaning of sub-section 2 of section 89, and therefore, under section 90 of the Act, not the subject of an appeal to this Court. It seems to me that it is not an interlocutory proceeding under that sub-section, but an order assuming to authorize the engineer to do what the Referee alone could do under sub-section 3.

The appeal must be allowed with costs and the order discharged.

*Appeal allowed.*

R. S. C.

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## BUGBEE V. CLERGUE.

*Judgment—Foreign Judgment—Action in Ontario—Want of Notice of Foreign Action—Limitation of Actions—Statement of Claim—Writ of Summons—“Absence Beyond Seas”—Foreigner.*

A creditor who has obtained judgment in a foreign country for the amount of his debt, may, if entitled to sue at all in this Province, sue either upon the foreign judgment or upon the original consideration.

An action upon a foreign judgment must fail if it be proved that the judgment has been obtained without notice to the defendant, actual or constructive.

By the endorsement of his writ the plaintiff claimed upon the foreign judgment only, but in his statement of claim he set up an alternative claim upon the original consideration, a promissory note:—

*Held*, that it was too late to object to this at the trial, and that as the period of limitation upon the note had not expired at the time of the issue of the writ the plaintiff was entitled to recover, although that period had expired before the filing and delivery of the statement of claim.

*Held*, also, that even if the action were treated as having been brought at the time of the filing and delivery of the statement of claim the defence of the statute of limitations was of no avail, because the statute began to run in favour of the defendant, a foreigner, only when he came within the Province, a short time before the issue of the writ in this Province.

Judgment of ARMOUR, C. J., affirmed.

**Statement.** APPEAL by the defendant from the judgment at the trial.

The following outline of the facts is taken from the judgment of OSLER, J. A. :—

The action was commenced by writ issued on the 25th of June, 1897. The writ was endorsed only with a claim upon a judgment recovered by the 'plaintiff' against the defendant on the 4th of February, 1896, in the Supreme Judicial Court in the State of Maine, U.S., at Bangor, in the county of Penobscot, in that State, for \$1,066.85.

The statement of claim was delivered on the 9th of December, 1897, and set forth a claim not only upon the judgment already mentioned, but also upon the promissory note made by the defendant and one Laughton, which was the cause of action upon which the judgment was recovered.

To the claim on the judgment the defendant pleaded that it had been recovered against him irregularly and

without process of law, and not according to the practice and rules or statutes of the State of Maine, and was not binding upon him in this Province, the defendant never having been personally served with process and having had no notice or knowledge of the action against him, or of any proceedings therein until long after the recovery of the judgment, and the defendant not having been at the time of the commencement of action, or at any time subsequent thereto, resident or domiciled within the jurisdiction of the Court, or within the jurisdiction of the United States, and having had no opportunity of appearing in the action or of defending himself therein. Statement.

To the claim upon the note the defendant pleaded that it was barred by the Statute of Limitations, the note having fallen due "more than six years prior to the commencement of this action." He also pleaded that the note was given by the makers thereof as security for money borrowed solely for the uses and purposes of a company called "The Public Works Company" of Bangor, of which Laughton was president and the defendant a director; that the makers of the note were merely guarantors of the debt of that company, and that by the law of Maine no action can be maintained against the makers or endorsers of such a note until the holder has first endeavoured by process of law to recover the amount of the debt from the primary debtor, which the plaintiff has never attempted to do.

The action was tried at Sault Ste. Marie on the 1st of December, 1898, before ARMOUR, C. J., who, on the 6th of February, 1899, gave the following judgment in the plaintiff's favour :—

ARMOUR, C. J. (after stating the form of the writ and the pleadings) :—

The cause was heard by me at the last sittings of this Court at Sault Ste. Marie, and the first question raised was as to the validity of the judgment. The plaintiff and the



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defendant had always been and still were subjects of the United States of America, and were at the time of the making of the note for which the said judgment was recovered residing in Bangor in the State of Maine where the plaintiff has ever since resided. The defendant was born in Bangor, and while resident there, resided with his father, and in the fall of 1894 went into business at Sault Ste. Marie and has ever since continued to reside there, as I find. The defendant was never served with the summons by which the action in which the said judgment was recovered was commenced, nor had he any notice or knowledge of any of the proceedings in the said action until after the said judgment was recovered and shortly before the commencement of this action. The summons was issued against him and the service thereof effected as if he were at the time, September, 1895, a resident of the State of Maine and according to the laws of that State, which provide for the service of such summons upon an absent defendant. After the service of the said summons one Benning C. Additon, an attorney-at-law of Bangor in the said State, entered a general appearance for the defendant to the said action, being at the time attorney-at-law for the said defendant in several other actions brought against the defendant in the said Court, and I find that the said Benning C. Additon was not authorized by the defendant to enter such general appearance for the defendant in the said action, and I also find that the said Benning C. Addition was not induced to enter such general appearance by any misrepresentation made by the plaintiff or by any one on his behalf, but understanding only that there was no defence to the said action, and in my opinion there was none. Subsequently to such general appearance the said judgment was recovered in due course.

I take it from the evidence that this judgment so obtained was, according to the law of the State of Maine, a regular judgment, and it so appears from a decision of Cutting, J., in *Buckfield Branch R. W. Co. v. Benson* (1857), 43 Me. 374, where he says: "If such appearance

should be unauthorized or fraudulent, the guilty party might be liable to respond in damages, and the injured party would be entitled to his writ of review. But such an act cannot be assigned as an error in law to contradict or impeach the validity of the record, for otherwise a suit might become interminable," and the same view was at one time taken by our Courts.

So that we have a regular judgment binding on the defendant in the State of Maine according to the law of that State, and I see no reason why it should not be enforced against him, a subject of that State, following what was said by the Court in *Schibsby v. Westenholz* (1870), L. R. 6 Q. B. 155: "If the defendants had been at the time of the judgment subjects of the country whose judgment is sought to be enforced against them, we think that its laws would have bound them."

And there is no hardship in so holding for the defendant, after he heard of the judgment and at any time since, could have had his writ of review in the Supreme Judicial Court of the State of Maine upon the grounds he alleged against the said judgment, and he still maintains his allegiance to the United States and disclaims any allegiance to this country: *Douglas v. Forrest* (1828), 4 Bing. 686.

The next question raised was that the statement of claim ought to have conformed to the writ of summons, and as the writ of summons was only endorsed with a claim for the judgment that the claim in the statement of claim for the note for which the judgment was recovered should be struck out, but no such question is raised by the statement of defence and it is too late to raise it now. If such an objection to the statement of claim were tenable at all it could only have been made available before delivery of the statement of defence and by motion to strike the claim for the promissory note out of the statement of claim, but I do not think that such a motion would have succeeded, for at the time the statement of claim was delivered Rule 244 was in force, which provides that "Wherever a statement of claim is delivered, the

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plaintiff may therein alter, modify or extend his claim without any amendment of the endorsement of the writ." *Ker v. Williams* (1886), 30 Sol. J. 238, was the case of a motion to strike out the plaintiff's statement of claim, where it was attempted by it to set up a totally distinct claim from that on the writ, and it bears no analogy to this case. *United Telephone Co. v. Tasker* (1888), 59 L. T. N. S. 852, was a similar motion and for a like cause. But *Sowden v. Sowden* (1868), 4 P. R. 276; *Large v. Large*, [1877] W. N. 198; and *Johnson v. Palmer* (1879), 4 C. P. D. 258, are ample authorities to shew that such a motion could not have succeeded.

The next question raised was that even if that part of the claim based upon the promissory note should be allowed to stand the action must be considered as to that cause of action to have been begun by the delivery of the statement of claim, but no such question is raised by the statement of defence, and it is too late to raise it now. The allegation in the statement of defence is that the right to bring an action on the promissory note has been barred by the Statute of Limitations, the said note having fallen due more than six years prior to the commencement of this action, which I must find against the defendant, for this action was commenced within six years after the said note fell due and this is not a case in which justice requires that any amendment should be made, if it could be made and would be available as a defence. The only way in which the question could have been raised, the plaintiff being within his rights in claiming for the note in the statement of claim, would have been upon a motion to strike out the claim upon the promissory note in the statement of claim before the delivery of the statement of defence, but I doubt if such a motion would have been successful under the circumstances of this case. If the plaintiff, after delivering his statement of claim claiming upon the judgment only, had sought to amend it by adding the claim upon the promissory note, the Court might have refused it upon the grounds that the remedy for the note

was then barred, or if made without application to the Court might have struck it out, but I do not say that under the circumstances of this case the Court would have done so: *Weldon v. Neal* (1887), 19 Q. B. D. 394. The cases of *Dumble v. Larush* (1878), 25 Gr. 552, and (1879), 27 Gr. 187, and *Chard v. Rae* (1889), 18 O. R. 371, afford no support to the defendant's contention. In the former the plaintiff, having no title at the time of the filing of the bill to the land in question, sought by amendment to set up a title acquired after the filing of the bill, which title had at the time of the amendment become extinguished by the Statute of Limitations. And in the latter the plaintiff brought his action, as he was entitled to do under the decisions of the Courts of Equity, as administrator before he obtained the letters of administration, and when he obtained the letters of administration, his only title to sue, his remedy was barred.

Then as to the promissory note the contention of the defendant was that it was shewn by the evidence that the loan of \$1,500 made by the plaintiff was not made to the firm of Laughton & Clergue, but to the Public Works Company; that at the time the loan was made there was no agreement that a note should be given for it; that afterwards at the request of the plaintiff the firm of Laughton & Clergue gave the note in question as a guaranty for the payment by the Public Works Company of the loan and that there was no consideration for it; and that before looking to the makers of the note the plaintiff was bound to have recourse first to the Public Works Company. Even if this were so I do not think that under the law of Maine it would afford any defence to this action, but I do not find upon the evidence the fact to be so. I think the evidence given by the plaintiff as to the transaction is much more reliable than that given by the defendant, more consistent with what is reasonable and probable and more consistent with the surrounding

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Judgment. circumstances. The loan was, I have no doubt, made by  
 ARMOUR, the plaintiff to the firm of Laughton & Clergue and not to  
 C.J. the Public Works Company.

[The learned Chief Justice discussed the evidence upon this point.]

I am of opinion, therefore, that the plaintiff is entitled to recover and I so direct.

The appeal was argued before OSLER, MACLENNAN, MOSS, and LISTER, JJ. A., on the 7th of December, 1899.

*Riddell*, Q. C., and *J. D. Falconbridge*, for the appellant. The cause of action set out in the alternative in the statement of claim should be disregarded. The defendant is entitled to know by the writ what the cause of action is, and is entitled to rely upon the cause of action endorsed upon the writ, and he enters his appearance as against the cause of action endorsed upon the writ, and not as against any other cause of action: *Ker v. Williams* (1886), 30 Sol. J. 238; *Union Telephone Co. v. Tasker* (1888), 59 L. T. N. S. 852. The judgment recovered in Maine was invalid and no action lies upon it. At the time of the issue of process in the Maine Court, and for several years before, the defendant was domiciled within the Province of Ontario, and was not subject to the jurisdiction of the Maine Court: *Schibsby v. Westenholz* (1870), L. R. 6 Q. B. 155; *Westlake's Private International Law*, 3rd ed., pp. 315, 323, 353; *Rousillon v. Rousillon* (1880), 14 Ch. D. 351; *Ochsenbein v. Papelier* (1873), L. R. 8 Ch. 695; *McLean v. Shields* (1885), 9 O. R. 699; *Pemberton v. Hughes*, [1899] 1 Ch. 781; *Trevelyan v. Myers* (1895), 26 O. R. 430; *Beaty v. Cromwell* (1883), 9 P. R. 547; *McConnell v. McConnell* (1889), 18 O. R. 36; *Turnbull v. Walker* (1892), 67 L. T. N. S. 767; *Piggott on Foreign Judgments*, 2nd ed., pp. 164 *et seq.* As the plaintiff has seen fit to bring his action upon what he asserts to be a judgment, he has

no other cause of action : Piggott on Foreign Judgments, Argument, 2nd ed., p. 23 ; Chand on Res Judicata, secs. 209-213 ; 2 Black on Judgments, secs. 825-827. If he be permitted to proceed with the other cause of action, the action must, *quoad* that, be considered as beginning at the time of the delivery of the statement of claim : *Lancaster v. Moss* (1899), 15 Times L. R. 476 ; *Dumble v. Larush* (1878), 25 Gr. 552 ; (1879), 27 Gr. 187 ; *Chard v. Rae* (1889), 18 O. R. 371, and the Statute of Limitations is a bar. In any event the law of the State of Maine prevails : Westlake, 3rd ed., p. 255 ; *Peninsular and Oriental S. S. Co. v. Shand* (1865), 3 Moo. P. C. N. S., at p. 290, and by this law the transaction is one of guaranty, and the action does not lie : *Read v. Cutts* (1831), 7 Me. 186 ; *Gillighan v. Boardman* (1848), 29 Me. 79.

*William Macdonald*, Q. C., for the respondent. It is not a valid objection that the statement of claim did not strictly conform to the endorsement on the writ : *McNab v. Macdonnell* (1892), 15 P. R. 14 ; *Johnson v. Palmer* (1879), 4 C. P. D. 258 ; *Large v. Large*, [1877] W. N. 198. The plaintiff is entitled to join in one action a claim on the judgment recovered in Maine and a claim on the original cause of action : *Hall v. Odber* (1809), 11 East 118 ; *Trevelyan v. Myers* (1895), 26 O. R. 430. The judgment was regular, for the defendant had not changed his domicile, and therefore the service of process was good and effectual : Savigny's Conflict of Laws, 2nd ed., p. 105. Even if the service were not good and effectual any irregularity or invalidity was cured by the subsequent appearance in the action : *Maine Bank v. Hervey* (1842), 21 Me. 38 ; *Ferguson v. Oliver* (1894), 99 Mich. 161 ; and the judgment cannot be impeached collaterally : *Buckfield Branch R. W. Co. v. Benson* (1857), 43 Me. 374. The defendant is liable on the note whether it is a guaranty or not, and the plaintiff was not bound to sue first the Public Works Company : *Prentiss v. Garland* (1875), 64 Me. 155.

*Riddell*, in reply.

Judgment. January 16th, 1900. OSLER, J.A. :—

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J.A.

The three questions in the case in substance are :

1. Whether the plaintiff has proved a valid foreign judgment upon which an action can be successfully maintained in the Courts of this country.

2. Whether the Statute of Limitations forms a defence to the claim upon the note under the circumstances I shall mention, and

3. Whether the note was given as a security or guaranty for the loan it represents or whether the defendant and his partner Laughton were, as the plaintiff contends, his real debtors.

Taking up these questions in the inverse order to that in which I have stated them, the third question seems to be wholly one of fact, and the evidence in my opinion entirely supports the finding of the learned Chief Justice that the plaintiff lent his money to the defendant and his partner Laughton, and that they, and not the Public Works Company, were his real debtors. That is the plaintiff's own account of the transaction, and it is supported by all the written evidence connected with it; the plaintiff's cheque payable to Laughton and Clergue, their own promissory note for the amount, and the defendant's letter to the plaintiff of the 19th of August, 1891, written, even though it is said to be, on the letter paper of the Public Works Company. All the surrounding circumstances are more consistent with the probability of the truth of the plaintiff's story than of the defendant's, and the finding on this point ought not to be disturbed.

Whether a different finding would have been of any avail to the defendant I very much doubt. My present impression is that the alleged obligation of the creditor in the State of Maine to pursue the principal debtor before resorting to the surety would be found to be matter of procedure only, and therefore no defence to the action against the surety here: *Bullock v. Caird* (1875), L. R. 10 Q. B. 276.

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OSLER, J.A.

Then, secondly, whether the claim upon the note is barred by the Statute of Limitations: Upon the issue as presented for trial that is certainly not the case. The action, as appears by the statement of claim, was commenced by the issue of the writ of summons on the 25th of June, 1897. The note became due, allowing days of grace, on the 4th of July, 1891. The defence, therefore, pleaded, that the note "fell due more than six years prior to the commencement of this action," is disproved. But the defendant says that the claim upon the note was not endorsed on the writ, and was set up for the first time in the statement of claim, which was not delivered until the 9th of December, 1897, and that as regards the note this must be taken to be the date of the commencement of the action. I cannot agree with this contention. It was not the issue tendered by the defendant on the pleadings, and I think the trial Judge was right in holding that the justice of the case did not require that an amendment should be allowed even if that were the proper method of raising the point. It may be that it could have been taken by motion to set aside the statement of claim for irregularity, but the opportunity for taking that course had long passed by. The case of *Weldon v. Neal* (1887), 19 Q.B.D. 394, was relied on. That was an action for slander. The trial Judge had, *in invitum*, given the plaintiff leave to amend the statement of claim by adding claims for other causes of action, such as assault and false imprisonment, then barred by the Statute of Limitations, and wholly unconnected with that originally sued for. The Court held that he ought not to have permitted such an amendment, and dismissed the action. But that is a very different case from this, where the two causes of action are directly related, and the irregularity, if it were one, was not struck at at the proper time, and the defendant has pleaded over treating the writ as the commencement of the action as to all the causes of action set forth in the statement of claim. The case of *Lancaster v. Moss* (1899), 15 T.L.R. 476, was decided under circumstances similar to those in *Weldon v. Neal*, and cannot help the defendant. The



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cases cited in the judgment below, viz., *Ker v. Williams* (1886), 30 Sol. J. 238; *United Telephone Co. v. Tasker* (1888), 59 L.T.N.S. 852; *Johnson v. Palmer* (1879), 4 C.P.D. 258, may be referred to.

On the merits, however, the defence of the Statute of Limitations must fail. The defendant pleads the Ontario Act only, and it is not pleaded or suggested that there is any prescriptive law in the State of Maine by which the debt or contract itself is extinguished after the lapse of any particular period from the time when the cause of action arose there. If he were now permitted to amend his plea so as to apply it to the statement of claim as the commencement of the action on the note the plaintiff must also be allowed to reply what, according to the fact proved, is a complete answer to the defence, viz., that the action was brought within six years of the defendant's first coming to this country after the cause of action arose.

It matters not that both parties were foreigners, residents of the same State where the cause of action arose, and that the plaintiff might have sued, or did sue, the defendant there before he left it to reside in this country. So far as regards our statute the time runs against the plaintiff only from the time when the defendant came within the jurisdiction of our own Courts: *Huber v. Steiner* (1835), 2 Bing. N.C. 202; *Harris v. Quine* (1869), L.R. 4 Q.B. 653; *Boulton v. Langmuir* (1897), 24 A.R. 618; Darby & Bosanquet, 2nd ed., p. 58; Westlake's Private International Law, 3rd ed., sec. 239.

There is nothing in the point that the cause of action on the note has become merged in the judgment. As regards the effect of a foreign judgment and proceedings thereon here, it has long been settled otherwise. "The plaintiff may sue \* \* on the original cause as well as on the judgment until the latter is satisfied, and it is common in the cases before the Judicature Acts to find counts on each in the same declaration:" Westlake, sec. 332; Foote's Private International Jurisprudence, 2nd ed., p. 543; *Trevelyan v. Myers* (1895), 26 O.R. 430.

There remains the question of the validity of the foreign

judgment, important only, in the view I take of the plaintiff's right to recover on the original cause of action, as affecting the disposition of the costs of the issues depending on it.

Both parties were, as they still are, subjects of the foreign country and of the State in which the judgment was obtained.

We adhere to the finding of the trial Judge, that when the proceedings were commenced the defendant was not a resident of the State, but was, as he still is, residing and carrying on business in this country. I do not think it is shewn that the defendant has made this the country of his domicile in the sense of its being his permanent home, if that be an element in the case.

It seems clear that he had neither notice nor knowledge of any kind of any of the proceedings in the action against him, nor of the recovery of the judgment therein, until shortly before the commencement of the present action. The procedure in the foreign State for the service of the writ of summons differs in the case of a resident and in that of an absent defendant, and in this instance the procedure in the former case was erroneously adopted, and service effected as in the case of a resident by leaving the summons at the defendant's last place of abode, instead of by giving public notice in a newspaper published in the county and obtaining an order allowing the service; a judgment by default in a case of that kind in such case being stayed for a year. By some mistake, not involving fraud or deliberate misconduct, an attorney, who had been instructed to defend certain other actions against the defendant, undertook with the plaintiff's attorney to appear, and did enter a general appearance in this case also, but wholly without authority. He did not defend it further on being assured by the plaintiff that there was no defence, and final judgment was recovered by default. By the practice of the court such a judgment would appear valid and regular until set aside. "If such appearance be unauthorized or fraudulent the guilty party might be liable to respond in dam-

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ages, and the injured party would be entitled to his bill of review. But such an act cannot be assumed as error in law to contradict or impeach the validity of the record, for otherwise a suit might become interminable": *Maine Bank v. Hervey* (1842), 21 Me. 38; *Buckfield Branch R. W. Co. v. Benson* (1857), 43 Me. 374.

The English practice was formerly even more severe, as the court refused to set aside a judgment so obtained unless the delinquent attorney were insolvent, so that the defendant would have no remedy against him. Since the case of *Bayley v. Buckland* (1847), 1 Exch. 1, the practice has been to set aside such a judgment on motion as irregular: *Roissier v. Westbrook* (1874), 24 C. P. 91, but until so set aside it stands as a valid and effective judgment, and thus, except in the mode of attacking it, there is substantially no difference between the Maine courts and our own as regards the situation of the defendant in respect of such a judgment.

The defendant had taken no proceeding to set aside or to review the judgment.

Unless the absence of notice to the defendant involves such a jurisdictional error as to compel our courts to regard the judgment as invalid, it seems clear, the defendant having been a subject of the foreign state in which it was recovered, that it is a judgment pronounced by a court of competent jurisdiction, that is to say, a court which had jurisdiction to summon the defendant to appear before it and to decide such matters as it has decided: *Schibsby v. Westenholz* (1870), L. R. 6 Q. B. 155, 160; *Rousillon v. Rousillon* (1880), 14 Ch. D. 351. Into the merits of such a judgment our courts make no enquiry.

In Dicey on the Conflict of Laws, p. 409, it is said: "A foreign judgment may sometimes be invalid on account of the proceedings in which the judgment was obtained being opposed to natural justice (*e.g.*, owing to want of due notice to the party affected thereby). But in such a case the court is (generally) not a court of competent jurisdiction." I do not understand that the writer intends

by the proposition to lay it down that the objection as to want of notice is open only where the court is not, for some other reason, of competent jurisdiction: see cases 1 and 2 put by him on p. 375.

Judgment.

OSLER,  
J.A.

In Foote's Private International Jurisprudence, 2nd ed., p. 559, it is said: "An error in jurisdiction is the only error which a foreign court is allowed to detect and set right," and in a note to the cases cited for this, the writer adds: "The fact, however, that a foreign judgment has been obtained without due notice to the defendant is equivalent to a wrongful assumption of jurisdiction." And on the following page: "Closely akin to the question of jurisdiction, with regard to which it has thus been shewn that a foreign judgment has been declared by a consensus of authorities to be examinable, is that of notice to the defendant. The fact that no notice, or no sufficient notice, was given to the defendant of the proceedings on which the judgment was founded may be an incident, of course, of the want of jurisdiction referred to. \* \* Thus, if a defendant is not resident in nor a subject of a foreign country, nor present within its territorial limits, and has no notice of an action brought against him in its tribunals, it is plain that the absence of notice is merged, so to speak, in the absence of jurisdiction, which would be amply sufficient to invalidate the judgment, even if notice was in fact given. But if a defendant is subject to the foreign jurisdiction, either by domicil or submission, and, according to the older opinions, even by nationality (*cf.* Dicey, p. 375), he is of course subject to its laws; and though he has no actual notice of an action commenced against him in its tribunals, and may not have been served with any writ or process, he may have had constructive notice which will satisfy those laws and be accepted by foreign tribunals as sufficient. If those laws, for instance, provide that notice may be effected by nailing a copy of the declaration on the court house door, etc., or by any other notice in law which cannot be said to be notice in fact, those who are properly subject to these laws will be bound by them and no other."



Judgment.

OSLER,  
J.A.

In *Bank of Australasia v. Harding* (1850), 9 C. B. 661, 19 L. J. C. P. 345, at p. 354, Maule, J., said, *arguendo*: "You insist here on the absence of notice of process. But there is nothing in that contrary to natural justice, if there has been some other kind of notice; for example, a proclamation or verbal notice." See *Douglas v. Forrest* (1828), 4 Bing. 686; *Copin v. Adamson* (1875), 1 Ex. D. 17; *Schibsby v. Westenholz* (1870), L. R. 6 Q. B. 155.

In the case at bar the law of the foreign State expressly provides for giving constructive notice of the action to an absent defendant, but the course prescribed was not followed and he had neither notice nor knowledge of the proceedings against him.

Then, was the only remedy open to him to apply to the courts of his own country to vacate or get rid of the judgment?

The defect involves much more than a mere error in procedure, and in my opinion the defendant has the right, in an action brought against him on the judgment in our courts, to say that it is contrary to natural justice that a judgment so obtained should be enforced against him here..

The recent case of *Pemberton v. Hughes*, [1899] 1 Ch. 781, decided after the judgment now in appeal was given, strongly, I think, supports this view.

In that case the judgment relied on in the English Court was a decree of divorce pronounced by a Florida Court between two persons who were both domiciled and resident in that State. The proceedings in Florida were unopposed, but it was contended that the decree was invalid because a shorter notice of the proceedings had been given than the rules of the court required. The Court of Appeal held that this irregularity, if it were one, could not affect the decree and that it was valid and must be recognized by the English courts. The importance of the case here is the clear recognition of the principle that the judgment of the foreign court must not offend against "English views of substantial justice" as regards

notice. "If," said Lindley, M. R., "a judgment is pronounced by a foreign court over persons within its jurisdiction and in a matter with which it is competent to deal, English courts never investigate the propriety of the proceedings in the foreign court, unless they offend against English views of substantial justice. Where no substantial justice, according to English notions, is offended, all that English courts look to is the finality of the judgment and the jurisdiction of the court, in this sense and to this extent—namely, its competence to entertain the sort of case which it did deal with, and its competence to require the defendant to appear before it. If the court had jurisdiction in this sense and to this extent, the courts of this country never inquire whether the jurisdiction has been properly or improperly exercised, provided always that no substantial injustice, according to English notions, has been committed."

Judgment.

OSLER,  
J.A.

Rigby, L. J., says: "Mrs. Erwin had all the notice of the proceedings which the law of the State required, though if we had a right to enquire further it might well be that there was an irregularity in fixing the day for appearance." And *per* Vaughan Williams, L. J.: "Here it is alleged there was no proper service. The true principle seems to me to be that a judgment, whether *in personam* or *in rem*, of a superior court having jurisdiction over the person, must be treated as valid till set aside either by the court itself or by some proceeding in the nature of a writ of error, unless there has been some defect in the initiation of proceedings, or in the course of proceedings, which would make it contrary to natural justice to treat the foreign judgment as valid, as, for instance, a case where there had been not only no service of process, but no knowledge of it. The allegation of no service alone would not, in such a case avail the defendant: *Buchanan v. Rucker* (1808), 9 East 192; *Ferguson v. Mahon* (1839), 11 A. & E. 179; Bullen and Leake's *Precedents*, 5th ed., p. 748."

In our case both the conditions referred to in the passage last cited exist, and therefore, as regards the claim upon

Judgment.  
OSLER,  
J.A.

the foreign judgment, I think the action fails. The defendant is entitled to so much of the costs of the issue and of the appeal as relate to this branch of the case. In other respects the judgment is affirmed and the appeal dismissed with costs.

MACLENNAN, J.A. :—

I have very little to add to the very elaborate judgment of my brother Osler, which I have had an opportunity of reading, and in which I concur.

I may say, however, on the question of the right to recover upon the foreign judgment, that when it was shewn by clear evidence that the judgment was one which would have been set aside by the Maine court, at the instance of the defendant, it followed that the plaintiff must fail upon that cause of action. Whether, before the change in our procedure, a court of law would or would not, have held the facts which entitled the defendant to have the judgment set aside a good bar to the action, there can be no doubt, in my opinion, that a court of equity would have deemed them sufficient to enjoin its further prosecution. If that be so we must hold that a sufficient defence has been established to the action so far as it is an action on the judgment.

Moss, J. A. :—

So far as the question of the validity of the judgment is concerned, I do not dissent from the view taken by the other members of the Court, though I wish to place my judgment—my conclusion—more distinctly upon the other two grounds upon which it has been placed by my brother Osler. I am so clear that the Statute of Limitations is not a bar that I do not think I need enter into the question of the judgment. I think, in the first place, that it is clear that, upon the findings of fact, the defendant was a primary debtor. The defendant was not a

guarantor; he was a primary debtor, but it is doubtful whether, even if when he was sued here, he was shewn to be a guarantor or surety he could set up the law of the State of Maine to the effect that before a creditor can sue the surety he must proceed and recover judgment against the primary debtor. I am not prepared to say that he could set that up as a defence to an action brought against him in this Province.

Judgment.

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Moss,  
J.A.

On the other branch it is quite clear to me that the original consideration may be sued upon notwithstanding the fact of the foreign judgment and that the original consideration was the promissory note in question.

The defence of the Statute of Limitations as pleaded, viz., that the cause of action accrued more than six years before the commencement of the action, was not true in fact. But the defendant urged that he should be allowed to treat the date of filing the statement of claim as the date of the commencement of the action in respect of the promissory note and to amend his defence accordingly. If he were permitted to do this,—I do not say he ought to be,—the plaintiff should be allowed to reply that when the cause of action accrued the defendant was beyond seas or out of Ontario. And this reply would be a complete answer to the defence of the statute, for, after the making of the note, the defendant did not come into Ontario, so as to render himself liable to be served with a writ of summons in an action, until 1894.

The defendant did not rely upon the Statute of Limitations in force in the State of Maine and his counsel stated that its effect was similar to that of the Statute of James, *i.e.*, to bar the remedy only, and not the right.

The plaintiff is, therefore, entitled to retain the judgment in his favour.

LISTER, J. A. :—

I agree with my brother Osler.

*Appeal dismissed.*

R. S. C.



## LAZIER V. ROBERTSON.

*Settlement—Contingent or Vested Estate.*

*Held*, affirming the judgment of ROBERTSON, J., 30 O. R. 517, that under the settlement in question the child who died before the period for conveying took a vested interest.

Statement. THIS was an appeal by the defendant Margaret Lazier from the judgment of ROBERTSON, J., reported 30 O. R. 517, and was argued before OSLER, MACLENNAN, MOSS, and LISTER, JJ. A., on the 7th of December, 1899.

*Shepley*, Q. C., and *H. W. Mickle*, for the appellant.  
*W. H. Blake*, for the respondent.

The facts are stated in the report below and the line of argument is there indicated. The following additional cases were cited: *In re Orlebar's Trusts* (1875), L. R. 20 Eq. 711, at p. 718; *Day v. Radcliffe* (1876), 3 Ch. D. 654; *Walker v. Mower* (1852), 16 Beav. 365; *In re Phene's Trusts* (1868), L.R. 5 Eq. 346; *Earl of Orford v. Churchill* (1814), 3 V. & B., at p. 69; *Ridgeway v. Munkittrick* (1841), 1 Dr. & W., at p. 93; *In re Heath's Settlement* (1856), 23 Beav. 193; *Adams v. Law* (1854), 17 How. 417.

January 16th, 1900. MACLENNAN, J. A. :—

The question in this appeal is whether the judgment is right in holding that the remainder in fee, limited to the children of the settlor, was a vested remainder, and not contingent upon their surviving their parents.

The settlement was in effect ante-nuptial, a covenant by the intended husband with trustees upon the celebration of the marriage to convey certain freehold lands to them in fee, upon certain defined trusts for the benefit of the intended wife and the children of the marriage. The conveyance was made shortly after the marriage, and bears

date on the 19th of March, 1838, and the trusts are identical in terms with those expressed in the articles. The first trust was to sell the lands as might be directed by a joint appointment by husband and wife, and to invest and deal with the purchase money upon certain trusts; and in default of appointment, to deal with the lands themselves in substantially the same manner as declared with respect to the purchase money. No appointment or sale was ever made; and the question arises upon the trusts declared concerning the land itself.

Judgment.  
MACLENNAN,  
J.A.

The deed is very long, and is clumsily drawn. The legal estate is vested in the trustees in fee simple; and, therefore, the limitations are all equitable. The scheme of the settlement was simple enough. It was to vest the land in the trustees in fee in trust for the wife for life; if no children of the marriage, remainder to the husband in fee; if there were children, remainder to the husband for life, and remainder to the children in fee. The trust was to continue until the ultimate remainder in fee, whether to the husband or to the children as the case might be, became an estate in possession, when it was to come to an end; and the estate was then to be conveyed to the person or persons so entitled in remainder. These trust limitations, which might have been expressed briefly and unambiguously in a few words, are set forth in the settlement in a series of clauses, with some want of clearness, which has given rise to this litigation. The husband died a good many years before his wife, who lived until the year 1898. They had two children. Alexander, who survived his father, married, and died before his mother, leaving him surviving one daughter; the respondent, Ethel Jane Robertson. The other child of the marriage is the appellant, Margaret Lazier, who survived both parents. The contention of the appellant is that the remainder in fee limited to the children was contingent upon their surviving both parents; that only those who did so are entitled; and that she is, therefore, now entitled to the whole estate, to the exclusion of her brother's daughter, the respondent.

Judgment. The clauses of the settlement may be paraphrased as follows, retaining and using all the words which seem to be material to the controversy.  
MACLENNAN,  
J.A.

The trustees were :

1. After the marriage, to pay the rents to Jane (the wife), for her natural life.

2. If William (the husband) should survive Jane, and there should be a child or children issue of the marriage then surviving, to pay the rents to William.

3. After the death of both Jane and William, to convey and assure the estate to the children issue of the said marriage, in fee ; or in case there should be one child only, issue of the said marriage, to convey the estate in fee to that child.

4. If Jane should die without issue of that marriage, then in trust to convey the estate to William in fee, or to such person as William should appoint by will in fee.

The appellant's argument is founded upon the language of clause 3, which directs that after the death of both Jane and William the trustees are to convey to the children, issue, etc. They argue that the deed contains no gift to children, but in this direction to convey ; that there can be no conveyance to a dead child ; and that, therefore, only one or more who survived their parents became entitled. If, however, there is to be found in the language of the settlement sufficient indication that the estate limited to the children was a vested estate, the difficulty arising from the direction to convey after the death of the parents disappears.

In that case the conveyance may be made to the heirs or devisees of any who may be dead. Even in the case of the appellant, if she had died immediately after her mother, and before there was time to make a conveyance, the direction of the settlement could still be complied with.

The authorities upon the construction of such settlements as this, where an intended husband is making provision for his intended wife and the children of the

marriage, are collected and discussed at page 397 *et seq.* of Judgment.  
 Elphinstone on the Interpretation of Deeds, under Rule 150. MACLENNAN,  
 I will not go over all the cases, but I cite the language of J.A.  
 Cottenham, L. C., in *Whatford v. Moore* (1837), 3 My. &  
 Cr. 270, also cited by my brother Robertson in his judg-  
 ment. The Lord Chancellor there says that in such  
 cases "the only reasonable course is to adopt the rule  
 which has been generally recognized, of leaning in favour  
 of a construction which includes all the children, if the  
 instrument affords fair grounds for doing so; but if not,  
 to give effect to the plain meaning of the words used."  
 In *Day v. Radcliffe* (1876), 3 Ch. D., at p. 658, the late  
 Sir George Jessel, M. R., referring to the language just  
 quoted, said: "I think that is a sensible rule." It is true  
 he adds: "When you find fair ground for doing so, then,  
 in marriage settlements and post-nuptial settlements con-  
 taining a recital of an intention to provide for all  
 the children of a particular person, or particular persons,  
 you are to lean to that construction which includes  
 them all; but you are not to have recourse to old  
 authorities to overcome the plain meaning of the words  
 used." But, in so doing, he was referring to the settle-  
 ment which he was then considering, and to the recital  
 which it contained, as affording the fair ground which the  
 rule required, and he did not mean to qualify the rule by  
 saying that such a recital was in his opinion the only fair  
 ground which would be sufficient. The question then is,  
 is there any fair ground in this settlement for leaning in  
 favour of a construction which includes all the children?  
 And I think there clearly is.

In the first place there are no words expressly confin-  
 ing the gift to the survivors. The words "then surviv-  
 ing" are used in clause 2, but they are not used in either  
 member of clause three, which is the governing clause.  
 The words used are simply "children, issue of the said  
 marriage," and "one child only, issue of the said marriage."  
 Again, if the words had been "in trust for" the children,  
 etc., or child, etc., instead of "to convey and assure to"



Judgment.  
MACLENNAN,  
J.A. the children or child, the case would be clear. Now, the words "convey and assure" were used, not as expressing the gift merely, but as expressing that the parents being now dead the trust was to be put an end to, and the trustees were to convey to the children the legal estate in the equitable remainder in fee, which had now become an estate in possession. Exactly the same language is used in clause 4 with reference to the father's equitable remainder in fee, which he was to have in case of his wife's death after the marriage without issue of the marriage, which was another event upon which the trust was to come to an end, and when the trustees were to convey. I think clause 3 means to say that when the parents are both dead then the children, issue of the marriage, are to have the land, and the trustees are to convey it to them and be done with it; and clause 4 in like manner means that if the wife dies without issue of the marriage, the land is then to belong to the husband, and the trustees are to convey it to him. I think the conveyancer used the words "convey and assure" in both clauses for the sole reason that the legal estate was in the trustees, and the trusts having in either case come to an end they are to convey the legal estate to the parties entitled.

There is, however, a further good reason within the rule of construction. If the appellant's argument is well founded, then if she herself, as well as her brother, had died before her mother, leaving a child or children, the latter would take nothing. It is inconceivable that such could have been the intention of the settlor.

In *Currie v. Larkins* (1864), 4 DeG. J. & S. 245, Knight-Bruce, L. J., used very strong language with regard to the construction of a prenuptial settlement, which, in one view of it, would exclude a son who died in his father's lifetime, even if he left a widow and children surviving. He said: "Neither upon principle nor upon authority, considering that the instrument was a prenuptial settlement, is it possible to adopt such a construction in the absence of words absolutely compulsory. If the words are absolutely

compulsory, they must be submitted to, but not otherwise." Now, if the gift to the children had failed altogether, because they all died before their parents, even if they all left children surviving them, the estate would then immediately revert to the settlor in fee. But clause 4 is wholly inconsistent with any such result as that, for it provides, that it is only in case of the wife dying after the marriage without issue, that it is to go back to, and to be conveyed and assured to him. The implication is, that if there is issue of the marriage, it is not to go back to him at all, but is to belong to the children.

Judgment.  


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MACLENNAN,  
J.A.

I therefore think there is reason, and strong reason, in this ante-nuptial settlement, for leaning to the construction in favour of all the children, and that such is the proper construction.

It was argued on behalf of the appellant that a declaration, which precedes the clauses in question, that the estate vested in the trustees was upon "trust to support and preserve the contingent remainders hereinafter limited and mentioned," indicated, or helped to indicate, that the estate given to the children was contingent. I do not think so. The declaration was wholly unnecessary, inasmuch as the estates are all equitable; but in any case, there were two undoubted contingent remainders to which the declaration might refer, namely, the husband's remainder for life, which was contingent on his surviving his wife, and his remainder in fee, which was contingent on there being no children, issue of the marriage.

Upon the whole I am of opinion that the judgment is right, and that the appeal should be dismissed.

Moss, J. A. :—

I am of opinion that the appeal fails.

I think there is shewn in the instrument in question an intent to provide for the children, issue of the marriage, generally, and not merely for a special class, and that there ought, therefore, to be applied to it the benevolent rule,

Judgment.

Moss,  
J.A.

which has been recognized in many cases, of leaning to that construction which includes all the children.

It seems clear that in the event (which, however, did not happen) of Jane Robertson's death her husband living and a child, issue of the marriage, surviving, the husband's interest under the settlement came to nothing more than an estate for his life. The case could not then occur upon which alone he was to be entitled to the fee, viz., the death of Jane Robertson without issue of the marriage.

Having regard to these provisions of the instrument, I think that if the event of Jane Robertson dying before her husband, leaving children, issue of the marriage, surviving, had happened, the equitable estate in remainder would have vested immediately in the children, the enjoyment in possession being postponed until their father's death.

And there appears no reason compelling a different conclusion in the event which has happened of the mother surviving her husband. True, the enjoyment in possession is postponed, but that is to let in the mother's precedent life estate; and the direction to convey is nothing more than pointing out the mode by which, when the time arrives, the trustees are to divest themselves of the legal estate and put an end to their trust.

There is no express gift of the remainder to those only of the children, issue of the marriage, who survive their mother, and the directions to convey ought not to be read so as to exclude all but such survivors, if they are capable of the other construction.

Much stress was laid by the appellant upon the occurrence in the instrument of a limitation to the grantees "to support and preserve the contingent remainders hereinafter limited and mentioned." But by the instrument the legal estate was vested in the grantees, and, therefore, as said by Sir George Jessel, M. R., in *Abbiss v. Burney* (1881), 17 Ch. D., at p. 230, that doctrine of contingent remainders which, until the recent statute, prevented con-

tingent remainders from taking effect at all, unless they vested at the moment of the termination of the prior estate in freehold, has no operation. The introduction of these words into the instrument should, I think, be treated as due to inadvertence, and not as indicative of the nature of any of the estates limited by it.

Judgment.

Moss, J.A.

OSLER, and LISTER, JJ.A., concurred.

*Appeal dismissed.*

R. S. C.

# RICE V. RICE.

*Fraudulent Conveyance—Husband and Wife—Income—Gift.*

AN appeal by the defendants from the judgment of a Divisional Court [ARMOUR, C. J., FALCONBRIDGE, and STREET, JJ.], reported 31 O.R. 59, was argued before OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., and FERGUSON, J., on the 24th of January, 1900, and on the 25th of January, 1900, was dismissed with costs, counsel for the respondent not being called upon to argue.

Statement.

*Johnston*, Q.C., and *J. Heighington*, for the appellants.  
*Aylesworth*, Q.C., and *H. W. Mickle*, for the respondent.

R. S. C.



## FLOER V. MICHIGAN CENTRAL RAILWAY COMPANY.

*Trial—Jury—Failure to Agree—Dismissal of Action—Rule 780.*

When in an action tried with a jury the presiding judge holds that there is evidence to submit to the jury and refuses a nonsuit, he cannot, upon the jury disagreeing, himself decide under Rule 780 in the defendant's favour upon his own view of the evidence.

Judgment of STREET, J., 30 O.R. 635, affirmed.

**Statement.**

APPEAL by the defendants from the judgment of STREET, J., reported 30 O.R. 635.

The action was brought to recover damages for the death of the plaintiff's husband, caused, as was alleged, by the negligence of the defendants. At the trial a motion for a nonsuit was refused, and, after the jury had disagreed and had been discharged, a further motion by the defendants to have judgment entered in their favour was also refused.

The appeal was against the refusal of each motion and was argued before MACLENNAN, MOSS, and LISTER, JJ.A., on the 13th March, 1900.

*D. W. Saunders*, and *Joseph Montgomery*, for the appellants.

*F. A. Anglin*, for the respondent.

March 27th, 1900. MACLENNAN, J.A.:—

There are two appeals. The defendants' counsel moved for a nonsuit both at the conclusion of the plaintiff's case and afterwards when all the evidence was in, and the motion was refused, and the case went to the jury. The first appeal is from the judgment refusing a nonsuit. The jury failed to agree, and were discharged, and the defendants' counsel then moved under Rule 780 to dismiss the action, and that motion was also refused. The second appeal is from that judgment.

On the first appeal, after a careful consideration of the evidence, and the arguments addressed to us, we cannot

say that the learned Judge was wrong in submitting the case to the jury.

Judgment.

MACLENNAN,  
J.A.

On the other appeal it was contended by Mr. Saunders that the learned Judge had put a wrong construction upon Rule 780, and that he should have considered the case as if he were trying it without a jury, and should have dismissed it.

We are of opinion, however, that the learned Judge was right in his construction of the rule. It is noticeable that the rule does not go so far as to authorize the judge to try the case without a jury owing to the disagreement. He can only decide it one way, he cannot decide it in favour of the plaintiff, and his only power is to dismiss the action. When we look at the history of the rule we discover its meaning. As it stands now it reads: "If the jury disagree and find no verdict, the judge at, or after the trial may, notwithstanding, dismiss the action." That is the form in which it is expressed by the Consolidated Rules of 1897. It is expressed to be a modification of Rule 799 of the Consolidated Rules of 1888, and it is evident that it is so. Rule 799 of 1888 is: "In any case where on the trial the jury disagree and find no verdict, the Court may, notwithstanding such disagreement, give judgment of nonsuit." Tracing the rule farther back we find its substance in R. S. O. (1877) ch. 50, sec. 290, and in 34 Vict. ch. 12, sec. 10 (O.). This last Act was an amendment to the Common Law Procedure Act, and the section provides: "In any case where on the trial leave is reserved to move to enter a nonsuit, or to enter a verdict for the defendant, and the jury disagree and find no verdict, the Court, on motion in term pursuant to such leave, may give the same judgment as if a verdict had been found for the plaintiff." Now, it is quite plain that until the change made in the rule in 1897, it was only when the case ought not to have been submitted to the jury that the Court could upon a disagreement enter a nonsuit, or a verdict for the defendant. The Judicature Act of 1881, by Rule 330, for the first time declared that a judgment of nonsuit, unless

Judgment. the Court ordered otherwise, should have the same effect  
MACLENNAN, as a judgment upon the merits for the defendant; and we  
J.A. think that when the rule was amended in 1897, by substituting a dismissal of the action for a judgment of nonsuit, it was not intended to enlarge or extend the operation of the rule, or to authorize the judge to decide the case upon conflicting evidence in favour of the defendant, as if he were trying it without a jury.

The appeal should be dismissed.

MOSS, J.A. :—

The action is to recover damages for the death of one Quirin Floer at a level crossing upon the defendants' line of railway, by reason, as it is alleged, of the defendants' negligence, and was tried before Street, J., with a jury, on the 21st of March, 1899.

At the conclusion of the plaintiff's case the defendants' counsel contended that there was no evidence of negligence proper to be submitted to the jury and requested the learned Judge to withdraw the case from the jury and enter judgment for the defendants.

This he declined to do and evidence for the defence was given, and at the conclusion of the whole case the defendants' counsel again moved for judgment on the ground that upon the whole evidence there was nothing to submit to the jury.

The learned Judge refused the motion and the jury after several hours spent in endeavouring to arrive at a verdict were unable to agree and were discharged.

Thereafter the defendants moved the learned trial Judge to dismiss the action under Rule 780 which he refused to do.

The defendants thereupon appealed to this Court, first from the ruling or decision at the trial, and secondly from the judgment of refusal to dismiss under Rule 780.

Upon a perusal and examination of the evidence it appears impossible to say that there was not evidence

proper to be submitted to the jury of neglect by the defendants' employees on the light west bound train by which the deceased was struck, to sound the whistle or ring the bell from a point distant eighty rods from the crossing at which the accident occurred.

That the whistle was sounded and the bell rung before the crossing was reached is not disputed, but whether at the statutory distance or at a point much closer to the crossing is in conflict upon the evidence, and the question was for the jury.

So whether the deceased acted carelessly or recklessly in attempting to cross at the time and under the circumstances was for the jury.

The learned Judge therefore committed no error in submitting the case to the jury.

Upon the motion under Rule 780, the learned Judge indicated that in his view the weight of evidence upon both these questions was in favour of the defendants, but he held that having held at the trial that there was evidence proper to be submitted to the jury, and being still of that opinion, he was not at liberty to dismiss the action.

The defendants contend that under Rule 780 the effect of a disagreement of the jury is to substitute the trial judge for the jury, and that he is thereupon to proceed to find the facts upon the evidence, and if he finds in favour of the defence to dismiss the action.

I agree with the learned trial Judge that this is not the meaning or intention of the rule.

It stands in the place of Rule 799 of the Consolidated Rules of 1888, under which it is clear that the only judgment the Court could give after disagreement of a jury was judgment of nonsuit. And as it was being declared that judgment of nonsuit was to have the same effect as a judgment upon the merits for the defendant, unless otherwise ordered, and as the trial Judge was being substituted for the Court, the expression "dismiss the action" used in Rule 780, was substituted for "give judg-

Judgment.

Moss,  
J.A.



Judgment. ment of nonsuit," as now substantially meaning the same thing.  
Moss,  
J.A.

Rule 799 is traceable to sec. 10 of 34 Vict. ch. 12 (O.), in amendment of the Common Law Procedure Act. That section provided that in any case where on the trial leave was reserved to move to enter a nonsuit or to enter a verdict for the defendant and the jury disagreed and found no verdict the Court, on motion in term pursuant to such leave, might give the same judgment as if a verdict had been found for the plaintiff.

Upon this it was decided that the Court could interfere only when in its opinion the trial judge ought to have nonsuited: *Feaver v. Montreal Telegraph Co.* (1875), 25 C. P. 161. See also *Hughes v. Canada Permanent Loan Society* (1876), 39 U. C. R., at p. 231; and *Armstrong v. Stewart* (1877), 28 C. P. 45.

If the Court were unable to conclude that there was no evidence proper to be submitted to the jury upon the issues between the parties the onus of maintaining which lay upon the plaintiff, the latter was entitled to have his case submitted to another jury.

There is nothing in Rule 799 of Consolidated Rules of 1888, or in the present Rule 780, shewing that the effect of a disagreement and failure to find a verdict is equivalent to a declaration that the case is thereafter to be treated and dealt with as a non-jury action.

As my brother Street has pointed out, the defendants' construction of Rule 780 would lead to rather inconclusive results.

Upon a disagreement the jury is discharged and the case stands for trial by another jury unless the defendant is in a position to move under the rule and moves accordingly.

If a motion be made and the judge be of the opinion upon the whole case that if he were trying it without a jury he would decide in favour of the plaintiff he is unable under this rule to give judgment for the plaintiff. He

can do no more than dismiss the motion and the case still stands for trial by another jury.

Judgment.

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Moss,  
J.A.

What reason is there for requiring the judge to try the whole case only for the purpose of determining whether he can decide in favour of the defendant and thereby deprive the plaintiff of his *prima facie* right to trial by another jury?

It appears to me that the effect of the rule is that the trial judge is put in the place the Court was in under Rule 799 of 1888. He is given power to reconsider his decision at the trial to let the case go to the jury although there is no verdict just as he may do where the jury has returned a verdict for the plaintiff: see *Adams v. Coleridge* (1884), 1 T. L. R. 84, and if upon reconsideration he comes to the conclusion he was wrong, he may do as he should have done at the trial.

I think the appeal should be dismissed.

LISTER, J. A. :—

I agree.

*Appeal dismissed.*

R. S. C.

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## PEACOCK V. COOPER.

*Evidence—Negligence—Fire—Sparks from Steamer.*

In an action to recover the value of buildings destroyed by fire, started, as was alleged, by sparks which escaped from the defective smokestack of a steamboat, evidence that on prior and subsequent days sparks of large size escaped from the smokestack is admissible to prove its defective construction, but opinionative evidence that having regard to the force and direction of the wind on the day in question sparks of this size, if they escaped, might have been carried to the building in question, is too conjectural and speculative.

Judgment of MEREDITH, C.J., affirmed.

Statement. APPEAL by the plaintiffs from the judgment at the trial.

The following statement of the facts is taken from the judgment of MOSS, J. A. :—

The appellants (plaintiffs) seek to recover damages from the defendant as the owner of the steamboat or barge *W. S. Ireland*, for the loss of a barn and other buildings and their contents by a fire which the plaintiffs allege was occasioned by sparks or cinders from the steamboat's smokestack.

The charge as made in the statement of claim is that, owing to the negligent and unskilful way in which the defendant managed the steamboat, and owing also to the defective and improper condition of the engine, furnace and smokestack, sparks from the fires and burning matter in the steamboat escaped and flew from it to and upon the plaintiffs' barn, outbuildings and fences, whereby the same were set on fire, and, together with the contents of the buildings, were burned and destroyed.

These charges were denied by the defendant, and, issue being joined, the case came on for trial before MEREDITH, C. J., and a jury.

While the plaintiff Peacock was giving his testimony, his counsel proposed to ask him the question whether on other occasions before the date of the fire and subsequently to the fire he had observed the smokestack emitting sparks and cinders, and thereupon a discussion arose as to the reception of the evidence.

It was conceded that on the day of the fire no sparks or cinders had been seen to come from the steamer's smoke-stack while in the vicinity of or as she passed the plaintiffs' farm. The evidence so far as it went shewed that on the day of the fire the steamer passed the plaintiffs' place with a tow, going against the current of the stream, and that a short time afterwards fire was observed in the straw-covered roof of a shed attached to the barn, whence it spread to the barn. Statement.

The distance from the middle of the stream to the shed was about 487 feet, and from the bank to the middle of the stream about 100 feet, and to the shed about 387 feet.

After discussion the plaintiffs' counsel stated that what he proposed to prove by the plaintiff Peacock, was that within a short time before the fire and a short time afterwards as well (not meaning the same day, but on previous and subsequent days), he noticed the steamboat going up the stream emitting sparks in large quantities, that he did not propose to prove by him that these sparks were carried as far as the place where his barn was situated, but he did propose to shew by other witnesses that on the occasion in question the wind was blowing strongly towards the barn, and that sparks so emitted could be carried so as to communicate fire as far as the plaintiffs' barn. What then occurred is thus recorded:—

“His Lordship—So I understand now the kind of evidence you intend to rely upon is the carrying of the sparks the distance that you speak of? Mr. Wilson—Then the force with which and the height to which the sparks were sent, both before and after the accident, out of the smokestack, the size and extent of these burning cinders, the strength of the wind and the direction in which the wind was blowing on the occasion when the fire actually took place. His Lordship—What you mean is, as I understand it, witnesses will say that sparks of a certain size were projected to a certain height above the smokestack? Mr. Wilson—Yes. His Lordship—And what you give evidence to shew is that with such a wind



**Statement.** as was prevailing at the time this fire occurred such sparks could be carried so as to ignite as far as this shed. Mr. Wilson—Yes. Of course I concede I cannot shew that any witnesses saw them carried to the barn at all. His Lordship—Or that any of the witnesses can prove that anything was burned by sparks emitted from this steamer to such a distance as the plaintiffs' building? Mr. Wilson—Yes, my lord, I cannot shew that. Of course, as I said before, there is no need of my formally tendering the evidence. His Lordship—Certainly not, you are to be in the same position as if you had tendered the evidence."

The learned Chief Justice thereupon ruled that this evidence was not properly receivable to shew that the fire originated from sparks emitted by the defendant's steamer, and he withdrew the case from the jury and dismissed the action. He had previously ruled against the plaintiffs that as regards damages the extent of the loss was the decrease in value of the inheritance by reason of the destruction of the buildings, and that evidence of loss arising from waste of time by reason of the happening of the fire shortly before the taking in a crop was not admissible.

A further question had been raised as to whether the plaintiff was obliged to prove negligence in the construction or management of the steamer's machinery, causing the emission of sparks, or whether he was entitled to succeed upon proof of the cause of the fire being sparks or a spark from the steamer's smokestack without more, and it was agreed that the plaintiffs were not to be prejudiced with regard to these questions by the course taken.

The appeal was argued before OSLER, MACLENNAN, MOSS, and LISTER, JJ. A., on the 17th of January, 1900.

*Matthew Wilson, Q.C.*, for the appellants. The evidence tendered should not have been rejected. *Edwards v. Ottawa River Navigation Co.* (1876), 39 U. C. R. 264, relied on in support of its rejection, is not in point; the evidence in question there being evidence of negligent

management on previous occasions. In *Piggot v. Eastern Counties R. W. Co.* (1846), 3 C. B. 229, evidence of the kind tendered in this case was admitted. It was not necessary to prove negligence; the defendants were using a dangerous element and are liable if damage resulted from its use: *Hilliard v. Thurston* (1884), 9 A. R. 514; *McLaren v. Canada Central R. W. Co.* (1883), 8 A. R. 564, at pp. 571, 576. In estimating the damages there should be an allowance for the extra expense occasioned by the loss at the special season of the year when the want of the barn resulted in serious deterioration of the plaintiffs' crops and increased work.

*J. S. Fraser*, for the respondent. The evidence tendered was merely evidence of hypothetical possibilities and was too vague. There was no attempt to shew that sparks had been carried to this distance on previous occasions. There was no evidence of negligence and the action was properly dismissed. The dicta in *Hilliard v. Thurston*, relied on, do not state the law correctly. The defendant was using a highway in a reasonable manner, and in the absence of negligence is not liable. His right is besides recognized by statute: R. S. C. ch. 78, and his liability is no greater than is that of a railway company when exercising its statutory powers: *Vaughan v. Taff Vale R. W. Co.* (1860), 5 H. & N. 679.

*Wilson*, in reply.

March 27th, 1900. OSLER, J. A.:—

I am of opinion that this appeal should be dismissed on the ground, so far as I am able to understand the discussion which took place at the trial, that the plaintiffs were not prepared to offer any evidence from which the jury could reasonably have inferred that sparks could have been carried so far from the smokestack of the defendant's steam tug as to set fire to the plaintiffs' premises. I must say that I wish that the witnesses had been actually produced, and the evidence they had

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OSLER,  
J.A.

to give on the subject taken or tendered in a formal manner. I take the case, however, as it stands, and as the parties seemed satisfied to leave it.

It thus becomes unnecessary to decide the other questions so much pressed at the trial and on the appeal, viz., as to the rejection of evidence of negligence, and whether the defendant's situation was that of a person using or managing a dangerous element without the authority of the law, and who would thus, according to the dicta in *Hilliard v. Thurston* (1884), 9 A. R. 514, to that effect, be liable without proof of negligence for injuries proved to have been caused by the escape of fire from the smoke-stack of his steam tug.

Moss, J. A. :—

The plaintiffs appealed on the grounds (1) of the rejection of the evidence as to the emission of sparks, (2) of the ruling as to the extent of the damages, (3) that the learned Chief Justice should have ruled that it was not incumbent upon the plaintiffs to prove negligence in the construction or management of the steamboat.

It is apparent from what has been abstracted, as well as from the plaintiffs' position as to their non-obligation to prove negligence, that the evidence as to the emission of sparks was not proffered merely for the purpose of proving defective construction or management. If it had been tendered for that purpose I think it ought to have been received: *McLaren v. Canada Central R. W. Co.* (1882), 32 C. P. 324; (1883), 8 A. R. 564. That decision was affirmed by the Judicial Committee of the Privy Council, 12th July, 1884, as appears by the reported opinion in 21 Can. L. J. 114. Their Lordships' opinion on this point is expressed as follows :—"The only objection remaining to be noticed is that which was taken by the appellants to the admission of evidence that the locomotive No. 5 was in use to throw fire. The argument addressed to their Lordships, in support of this objection, really went to the value, and not to the admissi-

bility, of the evidence; and their Lordships have no hesitation in holding that the objection is not well founded. The admissibility of evidence depends upon its character, and not upon its weight, and their Lordships cannot doubt that evidence tending to shew that engine No. 5 habitually threw more fire than the other locomotives used on the appellants' railway, might be legitimately taken into account by the jury in considering whether it was defective in construction." But in the present case the plaintiffs sought to go further; they sought to establish the fact that the fire originated from a spark or sparks cast from the steamboat's smokestack, by shewing that she was known to have emitted numerous sparks to a certain height above the smokestack on other occasions. They did not propose to shew that any of these sparks were actually carried to or fell upon the plaintiffs' premises, or ignited any substance thereon, or were carried to a distance as great as the plaintiffs' barn from the stream where the steamboat was. They were not in a position to prove that on various other occasions the steamboat had been seen to throw particles of ignited matter to a distance from her as great or greater than the shed which first took fire, so as to bring the case within the ruling in *Piggot v. Eastern Counties R. W. Co.* (1846), 3 C. B. 229.

These would be facts from which a jury might infer that the fire was caused by a spark thrown on the occasion in question. But what the plaintiffs proposed that the jury should be asked to determine the cause of the fire upon, was the opinionative testimony that, having regard to the emission of sparks and the force and direction of the wind on the day in question, a spark or sparks might on that occasion have travelled as far as the plaintiffs' shed.

This appears to me too conjectural and speculative to be submitted to a jury as proof of a fact. As tendered, it seems entirely collateral to the fact to be established, and it certainly does not answer the tests proposed by Lord Watson in *Metropolitan Asylum District v. Hill* (1882), 47 L. T. N. S., at p. 35, of, in the first instance, satisfying

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the Court that the collateral fact will, when established, be capable of affording a reasonable presumption or inference as to the matter in dispute, and in the next place, satisfying the Court that the evidence, when adduced, will be reasonably conclusive, and will not raise a difficult and doubtful controversy of precisely the same kind as that which the jury have to determine.

More inconclusive testimony than opinions as to the distance ignited particles will carry or be carried can hardly be conceived, especially when such opinions are not founded upon knowledge of actual cases.

I think the evidence proposed to be given in this case was rightly rejected.

That being so, the other questions do not arise, for the action was properly dismissed for want of proof that the defendant's steamboat was the cause of the fire.

MACLENNAN, and LISTER, JJ. A., concurred.

*Appeal dismissed.*

R. S. C.

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## RYAN V. WILLOUGHBY.

*Contract—Breach—Condition Precedent—Inability to Perform—Municipal Corporations—Resignation of Councillor—Disqualification of Councillor.*

The defendant, who was a municipal councillor, entered into a sub-contract with the plaintiff to do the brick and mason work under the plaintiff's contract with the municipality to build a town hall, that contract providing that the contractor should not sub-let the work or any part thereof without the consent in writing of the architect and municipality, and this consent the plaintiff was to obtain. The municipality refused to consent to the sub-contract on the ground that the defendant's services would be of value in the oversight of the contract :—

*Held*, that there could not be imported into the defendant's sub-contract an agreement to resign his seat as such an agreement to resign a public trust for private gain would be contrary to public policy and illegal, and that the defendant was not liable in damages because of the breach of an implied obligation to resign, though his resignation might, as the plaintiff contended, have enabled the plaintiff to fulfil the condition precedent on his part of obtaining the municipality's consent.

*Seemle* : If the sub-contract had taken effect the defendant would have been, under section 80 (1) of the Municipal Act, R. S. O. ch. 223, disqualified.

Judgment of a Divisional Court, 30 O. R. 411, reversed.

THIS was an appeal by the defendant from the judgment of a Divisional Court, reported 30 O. R. 411, and was argued before BOYD, C., OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 22nd of January, 1900. The facts are stated in the report below, and the line of argument is there indicated. Statement.

*Watson*, Q. C., and *J. A. Allan*, for the appellant.

*Shepley*, Q. C., for the respondent.

March 27th, 1900. BOYD, C. :—

The defendant told the plaintiff about a month before part of the contract between Ryan and Carleton Place was sublet to him, that he would resign as town councillor if he went into the contract. On the 1st of May, 1896, the sub-contract was signed "subject to all the terms and conditions" of the main contract. One of these terms or conditions was, the contractor (Ryan) "shall not sublet the

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BOYD, C.

works, or any part thereof, without the consent in writing of the architect and corporation."

When the defendant said he would resign if he went into the contract, he did not know that the work could not be sublet without the written consent of the corporation and architect.

His undertaking at the highest was, that getting a clear sub-contract, he would resign so as not to become subject to the penalties of the Municipal Act. A new element enters the case with the disclosure of the veto power of the corporation. The defendant did not undertake to resign his seat and then lose the contract by the refusal of the corporation to assent to the subletting. On the 6th of May, the plaintiff's letter to the architect of that date, indicates that he had made some provision for the necessary assent. He says: "I have let the contract of the mason work to one of the building committee; the committee is willing he should get it. I will have them write you to that effect. This is a good move, because he was one of the principal kickers." The deadlock arose before the 12th of May; on that day the plaintiff again writes to the architect: "I contracted with Mr. Willoughby to do all the mason work and had it signed. The council passed a resolution that they would not allow Mr. Willoughby to do the work; that they required him to see that the work was done properly and notified me to that effect. I think that Willoughby got sorry and got this way to get out of it."

The resolution refusing assent to the sub-contract was passed by the corporation on the 11th of May, and it was put on the ground that the defendant's services and experience would be of benefit to the council in seeing to the faithful execution of the contract. There was an attempt to make out in evidence what is alluded to in the plaintiff's letter of the 12th of May, but what was proved fell far short of shewing bad faith or collusion on the part of the defendant. The town corporation appear to have acted on their own responsibility, having regard to what they thought in the best interests of the municipality.

Willoughby says he made preparations to go on with the sub-contract—such as getting wheelbarrows made and providing for the scaffolding. He denies being sorry for having taken the sub-contract and says that he could have made money out of it. Owing to the course of the proceedings at the trial the evidence is very fragmentary, but I think the fair result as to the defendant's attitude is that after he had learned from councillors that the plaintiff had no power to sublet without their assent and that they wished Willoughby to remain in the council and would refuse to sanction the subletting, he then elected to stay in the council rather than resign and run the risk of losing the sub-contract by the council withholding the necessary assent. I do not think it is a reasonable conclusion to say that his first promise to resign if he would get the sub-contract is to be made the controlling element in the case when he spoke in ignorance of the paramount power of the council to frustrate his getting it.

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BOYD, C.

By the terms of the contract on which the action is brought it was the duty of the plaintiff to procure the consent in writing of both corporation and architect in order to validate the sub-contract entered into by the defendant. Neither of these has been obtained and the failure to obtain them is not upon this evidence to be charged upon the defendant. His oral promise to resign is not part of the contract sued upon, and it was made in ignorance of a material fact as already stated. He was absolved from that promise when he found that the plaintiff could not offer him more than a sub-contract subject to the assent of the corporation and the architect.

The matter is thus reduced to the contract now sued upon—all preliminary matter being excluded—and upon this contract the plaintiff has proved no cause of action.

There is another phase of the case not adverted to upon the argument. It was assumed that the defendant could of his own motion resign his seat in the council. But the statute then in force, 54 Vict. ch. 42, sec. 179 (O.), provides



Judgment. that the consent of the council is requisite, and this council  
BOYD, C. apparently in good faith were minded to withhold any such consent. Had the sub-contract not required the assent of the council to its efficacy the act of the defendant in entering into the contract would have wrought a statutory disqualification requiring him forthwith to vacate his seat : 55 Vict. ch. 42, secs. 77 and 178 (O.). But this agreement to sublet never became an efficacious and completed contract, so as to give any cause of action to the plaintiff thereunder. The action should be dismissed with costs.

OSLER, J. A. :—

The plaintiff sets forth a contract between himself and the defendant by which the latter covenanted to do and perform and execute all the mason and brickwork, with certain exceptions, which the plaintiff was himself bound to do under his contract with the town of Carleton Place, to erect and complete a town hall and fire hall in that town ; and he alleges that although in accordance with the terms of the contract with the defendant he duly notified the defendant to proceed with the work, the defendant has wrongfully neglected and refused to do so, whereby the plaintiff has suffered loss ; and he avers that he has done and performed all things necessary by him to be performed in connection with the agreement, and has been ready and willing at all times to carry out his part of the contract, and to do all that in him lay to enable the defendant to perform the same, but the defendant has neglected and refused to perform it.

The defendant pleads that the contract between the plaintiff and himself was subject to all the terms and conditions of the contract between the plaintiff and the town, one of which was that the plaintiff should not sublet the works or any part thereof without the consent in writing of the architect and of the corporation, and that neither of these consents was in fact ever obtained. To

this the plaintiff replies that the consents were withheld at the wrongful request and instigation of the defendant in order wrongfully to benefit him and to enable him, if possible, to repudiate and abandon his contract with the plaintiff.

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J.A.

At the trial the reply was not proved. On the contrary, the evidence for the plaintiff (that offered by the defendant on this point having for some unexplained reason been rejected), goes rather to shew that the consent of the council was withheld for a perfectly legitimate reason, viz., that the defendant being a member of the town council and a person specially experienced in work of the kind contracted to be done by the plaintiff, his practical knowledge would be of great advantage to the building committee in seeing that the contract was faithfully executed.

The plaintiff had judgment at the trial, though on what ground does not appear, and this judgment was affirmed in the Divisional Court on the ground that inasmuch as the corporation could not legally assent to the sub-contract so long as the defendant was a member of the council it was his duty to resign his seat so as to give them the opportunity of giving their consent effectually, and by not performing this duty he must be taken to have prevented the plaintiff from performing the condition precedent on his part of procuring the consent of the council. "The general rule," says my learned brother Street, in delivering the judgment of the Court, "as to the duties of parties under such circumstances is stated by Lord Blackburn in *Mackay v. Dick* (1881), 6 App. Cas. 251, 263, as follows: 'Where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect.'"

From this point of view, therefore, the case may be put

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**OSLER,  
J.A.**

on as high ground as if the defendant had by his contract expressly agreed to resign his seat in order that the council might be placed in a position to give a valid consent to the sub-contract. There is, of course, no such term expressed in his contract, nor do I think that before entering into the contract the defendant verbally agreed to resign except when in ignorance of the fact that the assent of the council was necessary. In other words the resignation he contemplated was that which, if he entered into a contract which had the effect of disqualifying him, he was by section 208 of the Municipal Act, R. S. O. ch. 223, bound to send in. He did not contemplate resigning his seat and at the same time running the risk of not getting the contract by reason of the council refusing their assent. Any verbal agreement on the subject is, however, of no importance. Unless the law imports such a term into the contract or implies it, it has no existence.

The Municipal Act of 1892, 55 Vict. ch. 42, sec. 77 (1) (O.), now R. S. O. ch. 223, sec. 80 (1), enacts that "no person having by himself or his partner an interest in any contract with or on behalf of the corporation, shall be qualified to be a member of the council of any municipal corporation." And section 83 of R. S. O. ch. 223, provides that in case a member of the council, either in his own name or in the name of another, and either alone or jointly with another, enters into a contract of any kind, or makes a purchase or sale in which the municipality is a party interested, the contract, purchase or sale shall be held void in any action thereon against the municipality.

The contract in question is not one which could be affected by section 83, as the municipality is no party thereto and for want of privity alone no action would lie thereon against it at the suit of the defendant, yet it would seem, nevertheless, to be one within section 80 (1), which would have given the defendant an interest in the plaintiff's contract with the municipality and which by force of that section and section 208 would disqualify the defendant to be a member of the council: *Nutton*

v. *Wilson* (1889), 22 Q. B. D. 744; *Barnacle v. Clark*, [1900] 1 Q. B. 279. Whether such contract would be so far efficacious before it had been assented to by the council as to operate a disqualification of the defendant is a question which was not argued and upon which I express no opinion. It has been assumed throughout that it would not become effective for any purpose except for such an action as the present until the assent of the council had been given: *Regina v. Francis* (1852), 18 Q. B. 526.

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J.A.

In *Collins v. Swindle* (1857), 6 Gr. 282, where a member of a municipal corporation agreed with another person that the latter should take in his own name a contract with the corporation for the execution of certain works and that the profits of the transaction should be divided between them, it was held that the former enactment, 16 Vict. ch. 181, sec. 25, corresponding with so much of sec. 80 (1) as I have quoted above, was a parliamentary prohibition of such a contract. I do not see any very substantial difference between that case and the present except in the secrecy which there surrounded the arrangement, and, as I have said, I think that the latter comes within section 80 (1), since the conflict between duty and interest plainly arises, which it is the object of the Act to prevent. It may well be doubted whether, if the council had given their assent, a valid contract would have thereby come into force between the plaintiff and defendant, but even if it would I think they were not bound, and indeed it was their duty not, to give it, as the result would at all events have been to disqualify their member. But I do not think that this is conclusive of the case or that it shews that it was the defendant's duty to resign or that the law implies a contract on his part to do so under such circumstances in order that the council might if they would give a valid assent.

The defendant had been duly elected to a public office, which under a penalty he was bound to accept and had accepted: Municipal Act, R. S. O. ch. 223, secs. 187, 319,



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J.A.**

and thereby became a trustee for the public of the office he had so been elected to and had accepted: *People v. Hurlbut* (1871), 24 Mich. 44; *State v. Anderson* (1887), 12 N. E. R. 656.

The Municipal Act makes provision, section 210, for the resignation by the member of his seat in the council, viz., that he may do so with the consent of the majority of the members present, to be entered upon the minutes of the council. It is, therefore, not a matter which depends upon the pleasure of the member himself, and except, perhaps, when he has disqualified himself he cannot validly resign without the consent of the council or by merely sending in or tendering his resignation. Valid or reasonable grounds may exist for the resignation, but of these the council are to be the judge and they might well decline to accept a resignation, and to put the municipality to the expense of a new election, when it is tendered simply for the purpose of enabling the member to become interested in a contract with the corporation.

In this case, assuming that the contract with the plaintiff had contained in express terms such an agreement to resign as the Court below has implied, it would be neither more nor less than an agreement to do so for pecuniary consideration, viz., to enable the defendant to obtain the sub-contract. I cannot think that this is a proper reason for his resignation or that such an agreement would be a valid one in law. The member may resign if the council will accept his resignation. That is one thing; it is another and wholly different thing for the member to contract with a third party for pecuniary consideration to resign or to tender the resignation of his public office and trust. It seems to me that such an agreement would be an illegal one and, therefore, not one which the law would imply or import into his contract as the Divisional Court has held. The case of *Forbes v. McDonald* (1880), 54 Cal. 98, may be cited. There a note was given to a trustee of a mining corporation in consideration of his resigning his office. It was held that the consideration was

illegal and the note void. The Court say: "It does not appear to us to be at all doubtful, that if the whole or a part of a consideration be that a trustee resign his trust, the consideration is illegal. It is *contra bonos mores*. Trustees of corporations owe duties to others besides themselves; they have been placed in a position of trust by the stockholders, and to those stockholders they must be faithful. It is a violation of that trust for them to be bought out of office. They may resign when they please, but they must not make profit or benefit to themselves in the matter of such resignation."

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J.A.

Much of what is here said applies *a fortiori* and with great force to the case before us. If the plaintiff is unable to procure the assent of the council to the sub-contract I think he cannot excuse himself by setting up an implied contract on the part of the defendant to resign his seat in the council.

Substantially, moreover, what was done by the council shewed that they would not have accepted the defendant's resignation had he tendered it and on this ground also the defence on the term the Divisional Court have implied in the contract fails.

The appeal must, therefore, be allowed and the action dismissed with costs throughout.

MACLENNAN, MOSS, and LISTER, JJ. A., concurred.

*Appeal allowed.*

R. S. C.

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## IN RE GLEN, FLEMING V. CURRY.

*Local Master—Resignation—Concurrent Appointments.*

While an appeal from his report was pending, a local master of the Supreme Court sent a letter of resignation to the Attorney-General's Department, and, without any acceptance of this resignation, a commission was issued appointing another gentleman "a local master" for the county in question. Subsequently the appeal was allowed and the report was referred back to "the master" for the county :—  
*Held*, that there could not be two local masters ; that the action of the Executive was equivalent to an acceptance of the resignation ; and that the reference must proceed before the new incumbent of the office. Judgment of a Divisional Court affirmed.

**Statement.** THIS was an appeal from the judgment of a Divisional Court, and was argued before BURTON, C. J. O., OSLER, MACLENNAN, MOSS, and LISTER, JJ. A., on the 19th of May, 1899. The point involved is stated in the judgments.

*S. H. Blake*, Q.C., for the appellants.

*Aylesworth*, Q.C., and *O. E. Fleming*, for the respondent.

September 12th, 1899. OSLER, J. A. :—

This motion was launched as an appeal from the ruling of Mr. J. F. Hare, local master of the Supreme Court at Windsor, that he was as such entitled to proceed with the reference to the master at Windsor under the order of Mr. Justice Street herein, dated the 27th of February, 1897. The grounds set forth in the notice of motion are that the reference directed was a reference back to the then master at Windsor, Mr. A. H. Clark, and that for the purpose of all matters pending in the master's office the said A. H. Clark must be regarded as the Master at Windsor, and that the said A. H. Clark "being seized" of this matter it would be more expeditious and less expensive to continue the reference before him than to begin a fresh reference before another officer. The regularity of the appointment which had been issued by Mr. Hare was not otherwise attacked nor was it sought to amend the order of reference.

This order was one made on appeal from the report of Mr. Clark. It simply directs a reference "back to the master," not to "the said" master, whose report was in question, nor to any person by name, and Mr. Hare's jurisdiction to act thereunder would have been unimpeachable had the office been vacated by the death of the former incumbent. Before the order was made, though the precise date has not been disclosed, it appears that Mr. Clark, who had for nine years previously been local master at Windsor in the County of Essex, had sent in his resignation of that office. There seems not to have been any formal acceptance of the resignation, but on the 27th of January, 1897, a commission was granted by the Lieutenant-Governor, which was duly recorded in the Provincial Secretary's office on the 1st of February, 1897, appointing Mr. J. F. Hare to be "a local master of the Supreme Court of Judicature for Ontario in and for the County of Essex." This appointment was gazetted on the 6th of February, 1897, and before the 20th of February, 1897, the new master took the statutory oath of office and transmitted it to the proper office in Toronto.

Judgment.

OSLER,  
J.A.

Upon this state of facts, I am of opinion that the Court below has rightly held that Mr. Hare was the local master at Windsor when Mr. Justice Street's order of the 27th of February, 1897, was made, and that the order did not refer the matter back to Mr. Clark who was then no longer the master.

The questions are: (1) Whether two persons might be appointed as one officer to the office of local master, or as two local masters each independent of the other. (2) If not, whether Mr. Hare's appointment was effectual, following Mr. Clark's resignation.

It appears to me that the first question is answered by a consideration of the provisions of the Act in force when Mr. Hare's appointment was made.

It is conceded that the office of master-in-ordinary or local master is a judicial office. The former is one of extremely ancient origin, the latter derives directly, as



**Judgment.** indeed do both now, from statute. The general rule is that a judicial office, differing in that respect from one that is merely ministerial, can be granted to one person only. Some judicial offices established by statute may, it is said, be granted to two, these two forming but one officer, and it is no objection in such a case that one is constituted by one patent and another by another patent: *Curle's Case*, 11 Rep. 3; *Jones v. Beau* (1691), 4 Mod. 16; Bac. Abr. Officers (K.).

**OSLER,  
J.A.**

This, of course, depends upon the language of the statute in the particular case. The Act in question (the Judicature Act of 1895) might have authorized the appointment of two masters as in the case of an early provincial statute of our own which was never acted on, or while constituting a single office its language might have been wide enough to permit of the appointment of two persons as the holder of it. This has not been done. Sec. 153 (1) enacts that there shall be a local master in every county or union of counties in Ontario other than the County of York, and sub-section 10 confers upon the Lieutenant-Governor the power of making the appointment. Sub-section 2 enacts that when a vacancy occurs in the office of local master the judge of the county court shall be the local master unless and until another person is appointed local master. And if in such case there are two county judges, both shall be local masters unless one of them or some other person is appointed sole local master. Reading these provisions together and applying the general rule *exceptio unius alterius excluditur* it is evident that except in the case of the special contingency mentioned in sub-section 2 of section 153, there is intended to be and can be but one person appointed as local master in any county at the same time, and therefore that if Mr. Clark's resignation was complete Mr. Hare's appointment duly took effect. It was not indeed argued by the appellants that Mr. Hare had not been legally appointed though we have been obliged to consider that question.

The great contention was that Mr. Clark was still master,

or a master, at the date of Mr. Justice Street's order, and that he was the master to whom the reference back must be assumed to have been directed, he having been the master whose report was in question. There can be little doubt that the mere act of sending in his resignation by Mr. Clark—an officer of the Crown holding his office during pleasure—would not be sufficient to vacate the office, and that some act on the part of the representative of the Crown accepting or permitting the resignation, or inconsistent with the continuance in office of the former holder, was necessary to indicate the pleasure of the Lieutenant-Governor to terminate the appointment: *Parker v. Lord Clive* (1769), 4 Burr. 2419; *Vertue v. Lord Clive* (1769), *ib.* 2472, and the recent case of *Regina v. Cuming, Ex parte Hall* (1887), 19 Q. B. D. 13, in which the former cases were considered and acted upon. But if there could be but one local master no stronger act of acceptance of Mr. Clark's resignation could be shewn than the granting of a new commission to the same office to another person: *Badger v. United States* (1876), 93 U. S. 599; *Blake v. United States* (1880), 103 U. S. 227; Myer's Federal Decisions, vol. 24, pp. 74, 99, secs. 203, 238. By these two acts, Mr. Clark's resignation and Mr. Hare's appointment, the former ceased to be local master and the latter became local master in his room. He alone filled the office at the date of Mr. Justice Street's order, and from thence hitherto, and was therefore the only person who could lawfully give an appointment to continue or take up the reference.

The amendment of section 145 of the Judicature Act, R. S. O. ch. 51, by 62 Vict. 2nd sess., ch. 11, sec. 3 (O.), has no bearing upon the case in judgment, as both parties conceded in the argument. It is, I must say, very difficult to extract any meaning from it, which, indeed, is probably the reason that neither party relied upon it.

I am, therefore, of opinion that the appeal should be dismissed with costs.

Judgment.

OSLER,  
J.A.

Judgment. MOSS, J. A. :—

Moss,  
J.A.

The only question on this appeal is whether on the 27th of February, 1897, or the 18th of June, 1898, the matters which, by the order of Street, J., pronounced on the earlier day upon an appeal from the report of the local master at Windsor, were referred back to the master, stood referred to Mr. A. H. Clark or to Mr. J. F. Hare.

It almost goes without saying that if both these gentlemen were incumbents of the office of local master of the Supreme Court in and for the County of Essex, it would be most reasonable to read the order as referring the matters back to Mr. Clark, who had dealt with the case and made the report which had been under appeal.

But before the 13th of January, 1897, the Attorney-General's department had received Mr. Clark's resignation of the office of local master at Windsor or in and for the County of Essex.

No formal acceptance of the resignation seems to have been intimated to Mr. Clark by the department.

It may be open to question whether a person occupying a public office could by the mere act of forwarding a letter of resignation render the office vacant against the will of the Crown : see *Regina v. Cuming, Ex parte Hall* (1887), 19 Q. B. D. 13; and the old cases against Lord Clive referred to in the judgment of A. L. Smith, J.

On the other hand it may be observed that in view of the provisions of sub-sec. 2 of sec. 153 of the Judicature Act, 1895 (R. S. O. ch. 51, secs. 143-145), to which I shall presently refer, the argument of difficulty and inconvenience resulting from the incumbent of the office of local master rendering it vacant by his own act of resignation is much weakened if not entirely destroyed. He would not be entitled to recall his resignation without the consent of the Executive and it may be that a resignation unless immediately rejected by the Executive places the county judge in the office until some other person is appointed.

But, however that may be, in the present case on the 15th or 16th of January, 1897, the Executive Council on a memorandum of recommendation, presumably in the usual course, appointed Mr. Hare a local master in and for the County of Essex. His commission issued on the 27th of January, 1897, and the appointment was gazetted on the 6th of February, 1897.

Judgment.

Moss,  
J.A.

These executive acts afford strong evidence of acceptance of Mr. Clark's resignation. But the answer made on this appeal is that the law permitted of the appointment of a local master for a county or union of counties while there was a person already occupying the office.

The legislation governing at the date of Mr. Hare's appointment is found in the Judicature Act, 1895. Section 153 (1) enacts that there shall be a local master in every county or union of counties except the County of York, and sub-section (2) that "when a vacancy occurs in the office of local master the judge of the county court shall be the local master until and unless another person is appointed local master."

So far the language seems to indicate the intention that there is to be only one local master in a county or union of counties. But the remainder of the sub-section seems to place it beyond doubt. It proceeds: "In such case if there are two county judges, a senior and junior judge, both judges shall be local masters until and unless one of them or some other person is appointed sole local master;" thus providing for apparently the only case in which there may be two local masters in a county or union of counties until the commission of one or both is superseded by the appointment of a sole local master.

The original of section 153 is section 64 of the Ontario Judicature Act, 1881, which in sub-section (2) seems to make the point still clearer.

This view of the statute is sufficient in itself to dispose of the appeal.

But other considerations based upon the common law and the history of the office of master in chancery in this



Judgment.

Moss,  
J.A.

Province lead to the same conclusion. In England the office of master is one of great antiquity and was of high judicial character: Bennet's Master's Office, p. 1 *et seq.*; and probably could not in the absence of custom or special legislative provision be the subject of a grant to two or more jointly: Chitty's Prerogatives of the Crown, p. 83.

The Provincial Act establishing a Court of Chancery in this Province, 7 Wm. IV. ch. 2, sec. 9, authorized the Governor-General, Lieutenant-Governor, or person administering the government of the Province, to appoint during pleasure two masters to the said Court, who, in addition to the duties usually performed by the like officers in England, were liable to perform such other duties as should be assigned to them by the Vice-Chancellor. It is almost needless to say that the duties of a master in chancery, while largely administrative, were and are to a considerable extent of a judicial character.

The power to appoint two masters under 7 Wm. IV. ch. 2, seems never to have been exercised, and the offices of master-in-ordinary and registrar of the court were united in one person until they were separated by section 12 of 12 Vict. ch. 64.

The latter Act seems to recognize only one incumbent of the office of master-in-ordinary. Neither in it nor in the Act 13 & 14 Vict. ch. 50, empowering the judges of the Court of Chancery to appoint masters and deputy registrars as they might consider necessary and expedient, nor in Order No. 11, of the Chancery Orders of January, 1851, defining the duties of the deputy masters and deputy registrars, nor in the subsequent legislative enactments and Chancery Orders down to and inclusive of section 64 of the Ontario Judicature Act, 1881, is there to be found any legislative sanction of the appointment of more than one local master in a county or union of counties.

Section 3 of the Act 62 Vict. ch. 11 (O.), was referred to, but its operation, whatever it may be, is not extended to this case, and it assists neither party.

I think we must leave the appellants to have recourse, if so advised, to the way opened to them by the order of the Divisional Court.

Judgment.

Moss,  
J.A.

The order appealed from should be affirmed with costs.

BURTON, C. J. O., MACLENNAN, and LISTER, JJ. A., concurred.

*Appeal dismissed.*

R. S. C.

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### SNELL V. TORONTO RAILWAY COMPANY.

*Master and Servant—Negligence—Street Railway—Motorman—Person in Charge or Control—Workmen's Compensation for Injuries Act—R. S. O. ch. 160, sec. 3, sub-sec. 5.*

The motorman of a car running on an electric system is a "person who has the charge or control" thereof within the meaning of sub-sec. 5 of sec. 3 of the Workmen's Compensation for Injuries Act, R. S. O. ch. 160, and his employers are liable in damages to a fellow servant for injuries sustained while in discharge of his duty, owing to the motorman's negligence in passing too close to a waggon which is moving out of the way of the car.

Judgment of FALCONBRIDGE, J., affirmed.

APPEAL by the defendants from the judgment at the trial. Statement.

The plaintiff was a conductor employed by the defendants, and brought the action to recover damages for injuries sustained by him by being thrown from a car while in discharge of his duty as conductor, the accident being the result, as was alleged, of negligence on the part of the motorman of the car. At the time of the accident the plaintiff was standing upon the lower and outer one of the two side steps of the car, having walked forward from the platform to take his fare from a passenger who had just come on the car. A waggon loaded with furniture was moving slowly ahead of the car in the same direction, and the motorman drove the car at a considerable rate of speed past the waggon as it was being turned out of the

**Statement.** way. The plaintiff was struck by some of the furniture and was knocked off and severely injured. No part of the car was struck. The accident took place about eight o'clock in the evening of the 28th of June, 1899, and it was proved that the motorman saw the waggon in plenty of time to have stopped the car if he had thought it necessary to do so. It was also proved that it was the plaintiff's duty to go to the passengers for their fares as they came on the car, and that he could not get to the passengers without using the side steps. The car was not crowded and there were no passengers standing on the side steps. There was some evidence that the motorman sounded the gong as he approached the waggon, but the plaintiff said he did not hear it.

The action was tried at Toronto on the 19th of January, 1900, before FALCONBRIDGE, J., and a jury, and the following questions were answered by them :—

Was the injury to the plaintiff caused by reason of the negligence and want of care of the motorman on the said car? Yes.

Or was it caused by reason of his own negligence or want of care contributing to the accident? No.

If you find that there was negligence and want of care on the part of the motorman, wherein did such negligence consist? Not slackening speed.

Did the plaintiff undertake or continue in the employment of the defendants with full knowledge and understanding of the danger of such employment and did he voluntarily incur the risk of the particular danger out of which the accident arose? No.

At what sum do you assess the damages? \$1,200.

Upon these answers judgment was given in the plaintiff's favour for \$1,200 and costs.

The appeal was argued before OSLER, MACLENNAN, MOSS, and LISTER, JJ. A., on the 2nd of April, 1900.

*James Bicknell*, for the appellants. The claim is based upon sub-sec. 5 of sec. 3 of R. S. O. ch. 160, "The Workmen's Compensation for Injuries Act," but the facts do not bring it within that sub-section. The motorman is not a person in charge or control of the car, even if a car comes within the sub-section. His duty is to attend to the turning on and off of the electric current when desired to do so by the conductor, and there is therefore no liability on the defendants' part for his negligence. At all events there is no liability to the plaintiff, whatever might be said as to the motorman's duty where the safety of passengers is concerned. The plaintiff knew that there was danger of collision with vehicles and it was his duty to look out for himself; the motorman owed no duty to him, and so long as he took care not to go so close to any vehicle as to endanger the defendants' property he was not to blame: *Blackley v. Toronto R. W. Co.* (unreported). Argument.

*T. C. Robinette*, and *J. M. Godfrey*, for the respondent. The motorman was in control of the car: *McCord v. Cammell & Co.*, [1896] A. C. 57, and he should have stopped or at least have slackened speed when he saw the waggon so close to the track. He knew that the plaintiff had to use the side steps from time to time and he was bound to exercise reasonable care for his protection or for that of any other persons who might be lawfully on those steps. Whether he did exercise reasonable care is a question of fact, and the finding of the jury on this point is amply supported by the evidence: see *Wilscam v. Montreal Street R. W. Co.* (1888), 32 L. C. Jur. 246; *Fraser v. London Street R. W. Co.* (1898), 29 O. R. 411; (1899), 26 A. R. 383; *McDermaid v. Edinburgh Street Tramways Co.* (1884), 12 Rettie 15; Booth on Street Railways, sec. 303, *et seq.*

*Bicknell*, in reply.

At the conclusion of the argument the judgment of the Court was delivered by



Judgment. OSIER, J. A. :—

OSIER,  
J.A.

We are all agreed that this appeal must be dismissed. The point involved is a narrow one and the case has been very fully discussed, so that it is not necessary for us to take time for its consideration.

There is no room for any contention as to contributory negligence. The plaintiff was on the side step in the discharge of his duty, and while there was entitled to assume that the motorman, who clearly was in control of the car in the sense that he could regulate its speed or bring it to a stop upon necessity for so doing arising, would keep a look-out and not run so close to vehicles or obstructions as to endanger persons who might be on the step. The motorman was not entitled to run as near as he could without actually bringing the car into collision with the waggon. He was bound to bear in mind that passengers or the plaintiff might be on the steps and to see that he allowed a margin of safety. He could at least have slackened speed, and this in itself would have been some warning. The evidence as to sounding the gong is not very satisfactory, but even if it were sounded, that would be no reason for going carelessly ahead and taking the chance of passing the waggon safely.

This is quite different from the case of *Blackley v. Toronto Railway Company*, which was very peculiar in its facts and led to much difference of opinion. There, the unfortunate young man who was killed got on the side step of the car on the wrong side and stayed in that place of danger for some time, when he had the opportunity of entering the car, and being in safety.

The appeal must be dismissed with costs.

*Appeal dismissed.*

R. S. C.

## CHOATE V. ONTARIO ROLLING MILL COMPANY, LIMITED.

*Master and Servant—Negligence—Dangerous Process—Want of Warning.*

The plaintiff while employed in removing the cut pieces from a pair of metal-cutting shears worked by steam power was struck by a flying piece of metal and severely injured. The machine was perfect of its kind and it was not shewn that a screen or guard could have been used, and the plaintiff was aware that there was danger. The danger when steel was being cut was greater than when iron was being cut, and the accident happened when steel was being cut :—

*Held*, that there should have been some system for giving warning when steel was about to be cut, and that this means of reducing the possible danger not having been adopted the defendants were liable in damages as at common law.

*Held*, also, *per* MACLENNAN, J. A., that as the foreman had been in the habit of warning the workmen when steel was to be cut and had neglected to do so on the occasion in question there was liability under the Workmen's Compensation for Injuries Act.

Judgment of ARMOUR, C. J., affirmed.

APPEAL by the defendants from the judgment at the trial. Statement.

The plaintiff was a workman employed by the defendants, and brought the action to recover damages for injuries sustained by him while working in their mill. His duty was to take away pieces of metal as they were cut by a pair of shears, and while doing this he was struck by a piece of metal, which was thrown off by the shears. The facts are stated in detail in the judgments.

The action was tried at Hamilton, on the 18th of April, 1899, before ARMOUR, C. J., and a jury, and a general verdict in the plaintiff's favour was given, the damages being assessed at \$250.

The appeal was argued before OSLER, MACLENNAN, MOSS, and LISTER, JJ. A., on the 9th of February, 1900.

*Osler*, Q. C., and *John Greer*, for the appellants.

*Teetzel*, Q. C., and *A. M. Lewis*, for the respondent.

Judgment. March 27th, 1900. OSLER, J. A. :--

OSLER,  
J.A.

The verdict in this case is small : the defendants called no evidence, no doubt because they had none which would minify the simple and unexaggerated description the plaintiff gave of the manner in which the accident happened, and there was no objection to the charge, which indeed seems not open to any, unless, indeed, that as to some or all of the negligence charged there is no evidence. So that interference is not invited unless something has gone absolutely wrong. I think on the whole that the case may be looked at as one of actionable negligence of the master, as at common law. There was evidence from which the jury might easily have come to the conclusion that the employment the plaintiff was engaged in was one of a dangerous character. His business was to stand behind the shears as they were being fed with the material they were cutting and to rake and carry away the pieces of iron or steel as they fell. Broken or cut off as they were by the powerful shears it seems *prima facie* not unlikely that they might sometimes fly out with considerable violence in the direction in which the plaintiff was standing, and the evidence is that they in fact did so, and the plaintiff speaks of two occasions, on one of which he was hit, and on the other the iron he was loading on his barrow was knocked off by a flying fragment.

Now, the machine itself was a perfect one, and it is not clear that any of the precautions suggested in the way of attaching an apron to it might not, if adopted, affect its usefulness. This, however, was not the only means the defendants might have adopted of reducing the danger to which their workmen were exposed, and the jury might reasonably think that it would not have been difficult or expensive to have provided some efficient system of giving warning when dangerous material was being cut. No such system had in fact been adopted, nor was there any provision made by the defendants on the subject. True it is, that the plaintiff says that the foreman "generally

came around and told us to stand back, that they were going to cut some steel, or sometimes he would say stuff that would fly," but there was no one regularly employed to watch and warn the men, and the foreman's conduct was not in compliance with any rules or regulation of his employers, but apparently voluntary and occasional, and when he omitted to give warning it could not be said that there was any breach of duty on his part towards his employers or the neglect of any precaution which he had been ordered to observe for the safety of the workmen. This removes the difficulty suggested regarding the case as one at common law, that the negligence was that of the foreman only, and hence the negligence of a fellow-servant which would not give rise to a cause of action at common law against the employers, and shews that the negligence was really that of the employers in omitting to provide a proper system by which the dangerous character of the employment might be mitigated or lessened.

I do not think there was evidence to submit to the jury that the machine was defective, or of neglect on the part of the foreman entrusted with superintendence, so as to make out a sufficient case for liability under the Workmen's Compensation for Injuries Act, and indeed the case was not left to the jury on the footing of there being evidence of neglect on the part of the foreman.

The appeal should be dismissed.

MACLENNAN, J. A. :—

The plaintiff was a labourer employed by the defendants in attending a pair of shears worked by steam power for cutting bars of iron or steel into smaller pieces, and his duty was, by means of a rake or hook, to remove the pieces as they fell from the shears, so as to prevent the clogging of the machine. While he was so employed, a piece of metal was projected from the shears and struck him upon the knee, inflicting a somewhat severe injury, for which the present action was brought. The plaintiff

Judgment.

OSLER,  
J.A.



Judgment. has recovered a verdict of \$250, and the defendants have  
MACLENNAN, brought this appeal.  
J.A.

The statement of claim alleges that the accident was caused by the negligence of the defendants and their foreman and superintendent; and by reason of a defective system adopted by the defendants in cutting steel, in not having provided any means to prevent the pieces of steel being cut from flying or being thrown into the air with great violence, thereby causing great danger to the workmen; and in not providing any system of warning when steel was being cut. In the particulars of claim the negligence of the foreman is said to have been in not giving warning that steel was about to be cut, he well knowing that there was danger of pieces of steel flying violently during the operation of cutting; and the negligence of the superintendent and of the defendants is charged to be the cutting of steel without a guard, shield, or protection, to prevent pieces of steel flying and endangering the workmen, and in adopting a system for cutting steel without shields or guards behind the shears to protect the workmen, or without any provision for warning when steel was being cut.

The defendants deny the alleged negligence by themselves and their foreman and superintendent, or that their system in cutting steel was defective, or that there was any defect in their machinery.

The plaintiff was himself the only witness who gave evidence of the accident. In speaking of the working of the machine he says that some pieces "would fly probably, to put it within bounds, twenty feet." When asked what sort of material would fly he answered, "Well, steel would fly." He says he was struck on another occasion, but not seriously; and that on another occasion, when he was lifting a shovel full of the pieces, a piece flew and knocked those on the shovel off. He says ordinary iron would not fly, and he nowhere says that it was a piece of steel which struck him. I think it is not very material whether it was a piece of steel or of iron; but, having

regard to the statement of defence, it is a fair inference that it was the practice to cut both steel and iron, and that it was in fact a piece of steel by which the plaintiff was hurt. The plaintiff produced a model of the machine, with an apron inserted, the use of which he said would protect the workman by intercepting the flying pieces, the rake to be used "over the top," that is, the top of the apron. On the question of warning, the plaintiff was asked, "Was there any system of watching and warning when they were cutting steel?" Answer, "The foreman generally came around and told us to stand back, that they were going to cut some steel, or sometimes he would say stuff that would fly." "Was there a regular man employed to watch and warn?" Answer, "No." In cross-examination he was asked, "And this guard suggested here would not do at all, would it? You could not see your work?" Answer, "It would be too far forward." It is not clear whether in this answer he is referring to the guard in his own model, or to that in the model produced by his witness Kiely, probably the latter, for the intention of the guard suggested by Kiely appears to be to allow the raking to be done beneath it, and not on the top, as intended by that suggested by the plaintiff.

The only other witness in the case, except as to damages, was one Kiely, a mechanical engineer and machinist, who produced a model of a machine, with an apron, devised by himself, to intercept the flying pieces of metal. His shield or apron is so constructed that the raking must be done beneath it and not over it, and he says it could be put in or taken out when necessary in five minutes. In other respects this witness's model is different from the plaintiff's, which, with the exception of the apron, is a model of the actual machine in question. He admits that the machine in question is one of Bertram's, that Bertram's work is all good work, that he has nothing to say against Bertram's work, but he has made his machine to shew how it ought to be made.

That is the whole of the evidence on the question of the

Judgment.  
 MACLENNAN,  
 J.A.

Judgment. defendants' liability, and at the close of the case the  
MACLENNAN, defendants' counsel submitted that there was no case made  
J.A. out. The objection was overruled, and the question is  
whether that ruling was right.

In his charge to the jury the learned Chief Justice put the case before them as a case of negligence at common law, and also as one upon the Workmen's Compensation for Injuries Act. As a case resting upon the common law, he asked the jury to say whether the employment was dangerous, and whether the defendants had used all reasonable precautions to protect the plaintiff, and as a case upon the Workmen's Compensation for Injuries Act the question was whether there was a defect in the machine which the defendants had neglected to remedy. Upon this latter branch of the case I think there cannot be said to have been any evidence to go to the jury of any defect in this machine. The only defect suggested was the want of an apron, but it was not shewn that aprons had ever been in use in such machines; and the plaintiff and his expert witness disagreed as to how such an apron should be constructed or used, if it could be used at all consistently with the efficient use of the machine. The case of *Walsh v. Whiteley* (1888), 21 Q. B. D. 371, establishes that the mere fact that a machine is dangerous is not of itself evidence of defect. In that case the Court said it would be placing an intolerable burden on employers to hold that they are to adopt every fresh improvement in machinery. This case is stronger, for it was not shewn that the improvement suggested had ever been in use. I do not find that that case has ever been questioned, although some observations of a Divisional Court in *Morgan v. Hutchins* (1890), 6 T. L. R. 219, may seem to be inconsistent with it. See also *Howson v. Barrett* (1888), 4 T. L. R. 449; *Butler v. Birnbaum* (1891), 7 T. L. R. 287; and *Blamires v. Lancashire and Yorkshire R. W. Co.* (1873), L. R. 8 Exch. 283. I therefore think that part of the case ought to have been withdrawn from the jury.

On the other part of the case, however, I think there

was evidence of negligence. The machine was dangerous to the workmen when steel was being cut; that was well known; and the foreman usually warned the workmen to stand back, when they were going to cut steel or stuff that would fly. The plaintiff does not say that on this occasion he was not warned; I think that was taken for granted. At common law the defendants would perhaps not be liable for such an omission on the part of the foreman, but I think we must assume that, having regard to the danger, the defendants regarded it as their duty, and the duty of their foreman, to give warning, and that, as the witness says, such was their general practice. If that is so, I think that the case falls within sub-sec. 2 of sec. 3 of the Workmen's Compensation for Injuries Act, and that the injury was caused by the negligence of the foreman, a person having superintendence entrusted to him, while in the exercise of such superintendence.

Judgment.  
MACLENNAN,  
J.A.

I therefore think the learned Chief Justice was right in submitting the case to the jury, although perhaps he ought to have called their attention more pointedly to sub-section 2 of section 3 of the Act.

MOSS, and LISTER, JJ. A., concurred with OSLER, J. A.

*Appeal dismissed.*

R. S. C.



## CALDWELL V. TOWN OF GALT.

*Municipal Corporations—Highways—Obstruction—By-law—Injunction.*

In an action to restrain the defendants from enforcing a by-law to compel the plaintiff to remove a verandah projecting some distance over one of the streets of the town, it was held, on the evidence, that the verandah had been built after the street had been dedicated and laid out, and that it was therefore an unlawful obstruction; but as it had been in existence for a great many years and as no special necessity for its removal was made out, the Court refused to grant the defendants a mandatory injunction against the plaintiff for its removal, leaving them to enforce their by-law in such way as they should be advised.

Judgment of ROSE, J., varied.

Statement. APPEAL by the plaintiff from the judgment at the trial.

The plaintiff was the owner of certain property situate on Main street in the town of Galt, upon which was a building known as the Central Hotel, and he brought the action to restrain the defendants from enforcing their by-law, No. 617, passed for the purpose of compelling the removal of the hotel verandah, which projected over the street. By way of counterclaim, the defendants asked that the plaintiff should be compelled by order of the Court to remove the verandah pursuant to the terms of the by-law.

The action was tried at Berlin, on the 21st of September, 1898, before ROSE, J., who dismissed the plaintiff's claim with costs, and made an order in the terms of the counterclaim.

By leave of the Court of Appeal, on the plaintiff's application, further evidence was taken, and the appeal was then argued before BURTON, C. J. O., OSLER, MACLENNAN, MOSS, and LISTER, JJ. A., on the 28th of November, 1899. The effect of the evidence is stated in the judgments.

*James Bicknell*, for the appellant. The fair result of the evidence is that a verandah had been maintained in

the present position before the street was laid out or opened, and the dedication of the street was a limited one, and subject to the then existing right: *Morant v. Chamberlain* (1861), 6 H. & N. 541; *Fisher v. Prowse* (1862), 2 B. & S. 770; *Robbins v. Jones* (1863), 15 C. B. N. S. 221; *Goodman v. Mayor of Saltash* (1882), 7 App. Cas. 633. The evidence is sufficient to rebut any presumption of absolute dedication: *Roberts v. Karr* (1808), 1 Camp. 262 (n.), 10 R. R. 676; *Poole v. Huskisson* (1843), 11 M. & W. 827; *Healey v. Batley* (1875), L. R. 19 Eq. 375; *Vernon v. St. James* (1879), 16 Ch. D. 449; *Mann v. Brodie* (1885), 10 App. Cas. 378; *Wells v. Northern R. W. Co.* (1887), 14 O. R. 594. An easement can be acquired over a highway, and one has been acquired here: *Rains v. Buxton* (1880), 14 Ch. D. 537; *Wallasey Local Board v. Gracey* (1887), 36 Ch. D. 593. Even if the plaintiff's right is not made out, the defendants have acquiesced in the use of the street by him, and should not, under the circumstances of this case be given any relief: *Sarnia v. Great Western R. W. Co.* (1861), 21 U. C. R. 59; *Toronto v. Lorsch* (1893), 24 O. R. 227; and are certainly not entitled to a mandatory injunction: *Daniel v. Ferguson*, [1891] 2 Ch. 27.

*E. E. A. Duvernet*, and *D. W. Card*, for the respondents. The defendants are entitled to relief under the counter-claim because they have suffered special injury: *St. Vincent v. Greenfield* (1887), 15 A. R. 567; *Fenelon Falls v. Victoria R. W. Co.* (1881), 29 Gr. 54; *Gooderham v. Toronto* (1890), 21 O. R. 120. The onus was on the plaintiff to make out beyond any doubt that there was a limited dedication, and this onus he has failed to discharge: *Regina v. Donaldson* (1874), 24 C. P. 148; *Rowe v. Sinclair* (1876), 26 C. P. 233; *Nash v. Glover* (1876), 24 Gr. 219; *Regina v. Petrie* (1855), 4 E. & B. 737. The description is strong evidence of dedication: 9 Am. and Eng. Encyc., 2nd ed., p. 55 *et seq.*; and so also is the fact of fencing: *ibid.* There could not be dedication with a reservation which would interfere with

Argument.

**Argument.** the use of the dedicated street: *Brown v. Edmonton* (1894), 23 S. C. R. 308; *Regina v. Charlesworth* (1851), 16 Q. B. 1012; *Arnold v. Blaker* (1871), L. R. 6 Q. B. 433; *Fitzpatrick v. Robinson* (1828), 1 Huds. & B. 585, at pp. 597, 598; *LeNeve v. Vestry of Mile End* (1858), 8 E. & B. 1054; especially in this Province, where the fee in the dedicated street becomes vested in the Crown: *Roberts v. Mitchell* (1894), 21 A. R. 433; *Palmatier v. McKibbin* (1894), 21 A. R. 441. A right of this kind cannot be acquired by prescription: Dillon, 4th ed., pp. 783, 798.

*Bicknell*, in reply.

March 27th, 1900. OSLER, J. A. :—

The by-law in question was passed under the authority of sec. 496, sub-sec. 28, of the Municipal Act of 1892, which empowers the council to pass by-laws for directing the removal of door steps, porches, railings, or other erections or obstructions, projecting into or over any road or other public communication.

The plaintiff is the owner of lot No. 9, on the south side of Main street, in the town of Galt, on which is built an hotel, known as the Central Hotel.

Attached to the south side or wall of the hotel is a double-storied verandah which projects for its full width over the street beyond the general line of the street. The part of the street used for the sidewalk and now covered by an asphalt pavement is overhung by the verandah.

The question tried was the plaintiff's right to maintain the verandah in its present position overhanging the street.

The origin of the street is not clearly proved. There is no evidence that it was an original allowance for road laid out by the Crown surveyor. Both parties seem to have regarded it at the trial as a road which had been dedicated by one of the early owners of the township lot when laying out a plan of the town.

A deed was proved, dated 11th of August, 1838, from the Hon. Wm. Dickson to Absalom Shade, conveying in fee *inter alia* sub-division lot one on the east side of the Grand River, as described by metes and bounds, containing 200 acres, more or less, saving and excepting thereout the following portions or parcels of land, "heretofore conveyed to and contracted for to sundry individuals by the said William Dickson at the request and concurrence of the said Absalom Shade, that is to say," and then proceeding to describe six several small parcels of land, all of which are expressed to be bounded on the south side by Main street, "all of which said lots or portions of land being reserved are particularly marked and designated upon a plan or map of the Village of Galt, on the east side of the Grand River, drawn by James Kirkpatrick, provincial land surveyor, for the said Absalom Shade."

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OSLER,  
J.A.

The dates of the conveyance of these small parcels are not proved, and it was said that Kirkpatrick's plan could not be found.

From this deed, however, under which the plaintiff claims, it is evident that Shade was interested in the property at an earlier date, and that lots had been previously sold by him and conveyed by Dickson at his request, bounded by the street in question, the existence of which as a street actually laid out prior to the date of the deed, must also be taken as proved.

In August, 1842, Absalom Shade conveyed in fee to the plaintiff's predecessors in title, James Kimball Andrews and Isaac Salyard, part of the same township lot, viz., village lot No. 9, south side of Main street, as described by metes and bounds.

Main street is spoken of in the evidence as a street sixty-six feet in width, the usual width of an original road allowance, straight and free from "jogs" on each side.

Unless the plaintiff can shew that the verandah was in its present position when the street was dedicated or before it existed as a street, it appears to me that his



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OSLER,  
J.A.

action fails. In other words, he must shew that the dedication was subject to the existing obstruction of the verandah: *Fisher v. Prowse* (1862), 2 B. & S. 770. If the verandah was placed there after the public right arose the lapse of time cannot justify its continuance. The learned trial Judge found as a fact that Main street was laid out on the ground as a highway and used as a highway prior to the building of the hotel, that the hotel was occupied for a year or more prior to the building of the verandah, and that the latter was an encroachment upon or obstruction of the highway.

On the appeal we permitted further evidence to be given by both parties. From the evidence taken as a whole it may, I think, be concluded that the hotel itself (not at first built for an hotel) was built in the year 1836 or 1837, that the street in front of it had been laid out before then to the same width as at present, though not, of course, used to the full width. One witness said the house was built after Shade had bought the land, and this may well be so, though he did not obtain the conveyance from Dickson until 1838. The land on which it stands was at first used by Shade as a coal yard, and it was fenced in by a stone fence on Main street and on Mill street, which bounds it on another side, a fence which was torn down when the house was built. An important fact is that the verandah was not put up contemporaneously with the hotel, but some two or three years afterwards, one witness putting it as late as three years after the rebellion, which would be about 1840 or 1841. It is said that the house was built by one Jameson, but whether for himself or for Shade does not appear. It was also proved that the lot of which the plaintiff is in possession measured from the street line, excluding the verandah, gives him one link more than in the measurement in the deed from Shade to Andrews and Salyard. Much of the recently admitted evidence was devoted to the question whether the verandah as it formerly existed had been enclosed at the east and west ends and on Main street by

a lattice with gates at each end, and on Main street, or whether the public passed freely underneath it, using that part of the street as a sidewalk.

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OSLER,  
J.A.

It does not strike me that this can be of any special importance in the case once it is shewn that the house was originally built on a street line, and that the verandah was a later erection.

It must be said that the evidence in some respects is not so clear and full as it ought to have been. If it could have been shewn that the street was an original allowance that would, of course, have been an end of the plaintiff's case. His case must be that the street originated by dedication, but it is not proved as a fact by whom it was dedicated, whether by Dickson, or by Shade, or by some earlier owner. If it was not dedicated by Shade, but by another, Shade could not affect such dedication by any act of his in erecting the verandah, assuming that it was erected by or for him as the owner of the hotel. On the other hand, if the dedication was by Shade as equitable owner before 1838, he could not subsequently limit his dedication, evidenced as it was by the laying out of the plan and the sale of lots bounded by the street line, fixed by the fencing of the lot in question, by extending the verandah beyond that line. *A fortiori* no one claiming under him could do so either.

On the whole it appears to me that the evidence supports the findings of the learned trial Judge that there was a street laid out—in effect the street as it at present exists—before the house (=hotel) was built, and that the verandah subsequently attached thereto was an encroachment on the street so laid out. Most probably at that time the encroachment was not thought to be of any importance, having regard to the then use of the street, but that cannot justify the plaintiff in maintaining it when in the public interest it has been deemed right that it should be removed.

The plaintiff relied upon a by-law, No. 212, of the defendants, 26th of June, 1871, permitting one Thomas Aikins,

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J.A.

a former proprietor of the hotel, to complete the verandah with wood. This appears to have been done at a time when a by-law was in force prohibiting the erection of wooden buildings within certain limits in the town, and to excuse the then proprietor from compliance with such by-law, on the ground that he had got out all his timber and material to re-erect the verandah with wood in ignorance of such prohibition.

If, however, the street line was as it would now appear to be, I know of no authority which the council had to permit the erection of obstructions on the street. Their by-law can hardly be in this respect pressed further than as being a waiver of the requirements of the fire limits by-law, and the by-law passed for that purpose would be no answer to an indictment of the plaintiff for obstructing the street: *Bennett v. Allcott* (1787), 2 T. R. 166; 1 Rev. Rep. 455; *Great North-West Central R. W. Co. v. Charlebois*, [1899] A. C. 114. For myself I must say that, considering the length of time the verandah had remained there, more than sixty years before action, and the defendants' conduct in passing by-law No. 212, the plaintiff and his predecessors had some reason to believe that it was there as of right, and as there does not appear to be any particular reason for now ordering it to be taken down, the appropriate remedy to compel its abolition is, in my opinion, by indictment, and this Court is not called upon to actively interfere to assist the defendants to enforce any rights they may have. I think that the appeal from the judgment dismissing the action should be dismissed without costs and that the defendants' counterclaim should also be dismissed in like manner, the judgment below being varied in that respect. We make no order respecting the costs of the motion to admit further evidence.

Moss, J. A. :—

The appellant obtained leave from this Court to adduce further evidence, the respondents to be at liberty to

adduce further evidence in answer if so advised. Witnesses were examined on behalf of both parties, with the result of not strengthening the appellant's case, but rather the contrary. Certainly the additional testimony affords no reason for interfering with the learned trial Judge's findings of fact.

Judgment.

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Moss,  
J.A.

The appellant's case at the trial and in this Court depended upon his ability to establish that Main street was a highway by dedication and that the dedication was a limited one so far as the verandah attached to the Central Hotel was concerned. In other words, that when the street was dedicated, the verandah was standing as it does to-day beyond the line of the street and that the dedication was subject thereto.

But in this I think he has failed.

The evidence supports the finding of the learned trial Judge that Main street was marked out upon the ground as a highway and was used as a highway prior to the building of the hotel.

He further finds upon the evidence before him that the hotel was built and occupied for a year or more prior to the building of the verandah. Upon the whole evidence now before us I would come to the conclusion that the verandah was first built in the year 1841 or 1842. That was several years after the structure which now forms the framework of the hotel was put up.

The conveyance of the farm lot by Dickson to Absalom Shade shews that the latter had purchased or agreed to purchase sometime before and that he had been dealing with portions of the lands fronting on what was then known and described as Main street.

This is supported by the oral testimony, from which it appears that before there was any building on the corner now occupied by the hotel, the lot was fenced in by a stone fence on Main street and on Mill street, and was used by Shade as a coal yard. This fence was on the line of Main street, up to which all the buildings on the south side came, including the hotel structure which was afterwards



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Moss,  
J.A.

built on the line of the fence, the latter being removed to make way for the building. The verandah, when built some years afterwards, projected beyond the line of and encroached upon the street.

The appellant sought to make it appear that for a number of years after the building was erected only a portion of the highway was in use, and he contended that the dedication ought to be restricted to the part used.

That argument might have some weight if the dedication rested upon proof of user alone: see *Neeld v. Hendon Urban District Council* (1899), 16 T. L. R. 50.

But the appellant in this case is faced with proof of a plan on which Main street is laid out as a highway, with conveyances made with reference and according to that plan of lots fronting on Main street, and with the fact that the lot on which his hotel stands was fenced in and used in accordance with the line of the existing street and that the conveyances through which he claims title to the lot, describe it by metes and bounds, which shew it to front on the line of the street marked by the first fence. It is clear from the conveyance from Shade to Andrews and Salyard, which the subsequent conveyances follow, that there was no intention to cover by description any land outside of the lot as shewn by the plan. The plan was not produced by the appellant and in its absence it may properly be held that the street was sixty-six feet in width throughout its entire length as stated by some of the witnesses and was so delineated in the plan.

If the highway referred to in the deeds as Main street is to be taken to be a dedicated highway and not an original road allowance, the intention to dedicate a highway sixty-six feet in width throughout without any limitation is sufficiently shewn. And if the onus of establishing that fact rested on the defendants they discharged it.

In truth the onus of shewing the limited dedication rested on the appellant, and he has failed to discharge it.

The facts exclude the application of the doctrine established in *Fisher v. Prowse* (1862), 2 B. & S. 770.

The appellant's action was, therefore, rightly dismissed. Judgment.

With regard to the defendants' counterclaim for the removal of the verandah :—The power of the Court to enforce by injunction, mandatory or otherwise, the provisions of a municipal by-law except at the instance and upon the information of the Attorney-General, has been questioned : see the subject alluded to in *Attorney-General v. Campbell* (1872), 19 Gr. 299. In any case it is one which the Court will be chary of exercising, and the circumstances here do not call for the active intervention of the Court.

Moss,  
J.A.

In the circumstances of the case, I think the defendants should be left to the ordinary methods of enforcing obedience to their by-law.

BURTON, C. J. O., MACLENNAN, and LISTER, JJ. A., concurred.

*Appeal allowed in part.*

R. S. C.

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## SMYLIE V. THE QUEEN.

*Crown—Timber Licenses—“Manufacturing Condition”—Constitutional Law—61 Vict. ch. 19 (O.)—Practice—Petition of Right—Amendment.*

The Act, 61 Vict. ch. 19 (O.), making applicable to timber licenses the condition approved by order-in-council of the 17th of February, 1897, that all pine timber cut under such licenses shall be manufactured into sawn lumber in Canada, is *intra vires*, and applies to licenses issued after the passing of the Act in renewal of licenses in force at the time of its passage.

The rights acquired under sales and licenses of timber limits under “The Crown Timber Act” considered.

A petition of right may be amended at the trial.

Judgment of STREET, J., 31 O. R. 202, affirmed.

**Statement.** THIS was an appeal by the suppliants from the judgment of STREET, J., reported 31 O.R. 202, and was argued before OSLER, MACLENNAN, MOSS, and LISTER, JJ. A., on the 7th and 8th of February, 1900. The facts are stated in the report below and in the judgments in this Court, and the nature of the arguments adduced is there indicated.

*H. J. Scott*, Q.C., for the appellants.

*S. H. Blake*, Q.C., and *Walter Gow*, for the respondent.

April 24th, 1900. OSLER, J. A. :—

This is an appeal by the petitioners from the judgment of STREET, J., at the trial, whereby the validity of the Provincial Statute, 61 Vict. ch. 9 (O.), passed 17th of January, 1898, and of the Crown timber regulations mentioned in Schedule A. of the Act, as affecting certain timber berths, the plaintiffs’ interest in which is in question, was affirmed.

The petitioner Smylie is the only person beneficially interested in the matter in litigation.

Timber limits or berths consist of delimited sections of the wild or waste lands of the Crown, generally of very large extent, over which, by the authority of a Provincial Act, the original of which is 12 Vict. ch. 30 (1849), licenses to cut timber are granted by the Commissioner of Crown Lands. The berths in question are No. 120 of the Crown

timber sale of 1872, and Nos. 5 and 8 of the Crown timber sale of 1885.

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OSLER,  
J.A.

The Crown timber regulations in force at the date of all of these sales were those established by Order in Council of the 16th of April, 1869, and subsequent orders, the latter, I think, not necessary to be noticed. The Provincial Statute in force in 1872 was ch. 23 of the Consolidated Statutes of the old Province of Canada (1859), "An Act respecting the sale and management of timber on public lands." That in force in 1885 was ch. 26 of the Revised Statutes of Ontario, 1877, bearing the same title. Both of these are merely the re-enactment and consolidation of the original Act of 1849, the provisions of which, so far as the subject of the present proceeding is concerned, have been retained almost in *ipsissimis verbis* in all the statute law revisions down to that of 1897, which came into force on the 31st of December, 1897. For the sake of convenience I quote from the Act ch. 23 of the Consolidated Statutes of Canada. This, as re-enacted in the revision of 1887, ch. 28, was in force when the Crown timber regulations of the 17th of December, 1897, were passed, out of which, and the Act confirming them, 61 Vict. ch. 9 (O.), the present litigation has arisen.

By these regulations it was provided that any license or permit to cut timber on the ungranted lands of the Crown which should be issued after the 30th of April, 1898, should contain and be subject to the condition that all pine which might be cut into logs or otherwise, in pursuance of such license or permit, should, except as thereafter provided for, be manufactured into sawn lumber in Canada. It is the imposition of this condition—known as the manufacturing condition—upon his license for 1898-99 of which the petitioner complains. His contention is (1) That it was not within the power of the Lieutenant-Governor in Council to pass or enforce the regulation of the 17th of December in question, it not being within the purview of what he denominates his contracts with the Crown on the sales of



**Judgment.** 1872 and 1885, which entitle him to the renewal of his license every year free at all events from any condition dictating to him what he shall do with his timber after he has cut it under the license; (2) That the Act which confirms the regulations of December, 1897, is not to be construed retroactively as affecting berths sold previous to its passage, but must be construed as applying to licenses granted in respect of those subsequently sold; (3) That the Act is *ultra vires* the Provincial Legislature as being an interference with trade and commerce.

**OSLER,  
J.A.**

The arguments before us took a very wide range, entering at considerable length into the history of the dealings of the Crown with the wild lands of the Province from 1826 hitherto, which do not appear to me to have much bearing upon the point or points in issue, which must turn in the end upon the application and validity of the Act 61 Vict. ch. 9 (O.), but I will, as briefly as possible, refer to the course of practice which seems to have prevailed at different periods down to the Act of 1849.

From a very early period and at least as far back as 1826, licenses to cut timber on the wild or waste lands of the Crown were put up for sale at an agreed price for the quantity of timber in respect of which the license was applied for. In the earlier instructions to the local authorities, *e.g.*, those of 1827 from the Lords Commissioners of Her Majesty's Treasury to the Surveyor-General of Roads and Forests in Upper Canada, there is no allusion to a renewal of the license, which became void if the timber was not cut within nine months from its date. But under such licenses the licensees paid only for the timber they actually cut. After the union of the Provinces, from 1842 onwards to 1849, licenses continued to be put up for sale, but a deposit of one-quarter of the amount of the price to be paid for the timber (the quantity or minimum quantity being specified in the license) was required to be paid into the Crown Lands Agent's office (conditions of 1842-45); or, under the regulations of June and August, 1846, timber berths, as they were there called,

might be sold to applicants and in case of competition adjudged to the party bidding the highest premium.

Judgment.

OSLER,  
J.A.

What was actually purchased was the license for the limited period, not exceeding a year, for which it issued, but the practice of the department as provided by the regulations was to renew the license from year to year, if the holder complied with such regulations as might from time to time be imposed and subject thereto. Such regulations might affect the yearly ground rent to be paid in respect of the berth, or might exclude from the renewal license territory or surveyed lots subsequently sold to settlers comprised within the limit or berth as defined in the first license, thus diminishing the extent of the berth, and it is very plain that the license holder was never deemed to have acquired an indefeasible right against the Crown to the renewal of his license upon the same terms or to the same extent as the first license, merely because he had paid a bonus or premium for the right to cut timber over the territory originally defined.

That was the state of things in 1849, when the Act 12 Vict. ch. 30, was passed, the relative provisions of which, as re-enacted, continue in force to this day although the transactions between the Crown and individuals have attained a magnitude and importance probably not then contemplated.

The first section of this Act enacts that the Commissioner of Crown Lands may grant licenses to cut timber on the ungranted lands of the Crown at such rates and subject to such conditions, regulations, and restrictions, as may from time to time be established by the Governor-in-Council: provided always that no license shall be so granted for a longer period than twelve months from the date thereof.

Section 2. The licenses so granted shall describe the ground on which the timber is to be cut, and shall be held to confer for the time being, on the nominee, the right to take and keep exclusive possession of the premises so described, to the exclusion of all other parties, subject to such

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J.A.

regulations and restrictions as may be established. Licenses shall vest in the holder all rights of property whatsoever, in all trees, timber, and lumber, cut upon or within the limits of such license during the term thereof, whether by the holder or any other person, and entitle the holder to seize such trees, etc., when found in the possession of any unauthorized person, and to institute any action at law, etc., against wrongdoers and trespassers. All proceedings pending at the expiration of the license may be continued to final termination as if the license had not expired.

These sections correspond with the 1st, 2nd, and 3rd secs. of ch. 23 of the Consolidated Statutes of Canada.

The regulations in force during the period between 1849 and 1866, though differing in details, do not seem to have introduced anything specially new in principle in the mode of dealing with the timber on Crown lands, beyond the imposition of a yearly ground rent per mile. Claims were also to be admitted, in preference to all others, to a renewal of their licenses in favour of licensees who had occupied their limits and complied with the requirements of the office, or who had complied with all the regulations (regulations of 1849 and 1851). In the regulations adopted in 1866, the year previous to Confederation--superseding those of 1851, there is a provision that licenses for vacant berths, together with "all forfeited timber licenses" shall be offered for sale at an upset price of \$4 per square mile, or at such other rate as the Commissioner of Crown Lands may fix, and shall be awarded to the highest bidder at the time of sale. Newly granted licenses and renewals of licenses for berths which have been duly occupied are to be subject to a specified yearly ground rent, increasing annually if the berth has not been occupied. License holders who have duly complied with all existing regulations shall be entitled to a renewal of their licenses on complying with certain conditions.

In 1869 these regulations were, in their turn, superseded by those already referred to as being in force when the

plaintiff or his predecessors in title obtained the first license to the berths now in question.

Judgment.

OSLER,  
J.A.

In these regulations we find for the first time language which might imply an intention to take authority to sell the timber berths or limits themselves, instead of, as hitherto, selling the yearly license to cut the timber thereon, and stress was laid on this by the appellant as if he had thereby acquired some larger title to the timber than the yearly license would confer upon him. We cannot, however, assume that the Lieutenant-Governor in Council intended to do anything opposed to the statute, which only authorizes the Commissioner of Crown Lands to grant licenses to cut timber on the lands—licenses which by law must expire at the expiration of twelve months from their date. Such a license was, in my opinion, the only thing authorized and intended by these regulations to be sold, however large the sum paid at the sale, which can only be regarded as a premium or bonus for the license, as indeed the conditions of sale in each case expressly describe it. It may be that under the power to make “conditions, regulations, and restrictions,” the Lieutenant-Governor in Council had authority to provide, as these regulations purport to do, for renewing the license on proper terms. It is not necessary to decide that, although it does appear to be quite opposed to the clear words of the Act, which seem to contemplate that the Crown should be perfectly unfettered and free to deal with the timber at the expiration of each license year as it might think fit, but it is important to point out that the contract on which the appellant relies, as evidenced by the regulations the license and the conditions of sale, makes it perfectly clear that each license, whether original or renewed, or to speak more accurately, each license, is subject, not merely to the regulations existing at the time of the sale and the earliest license, but also to all those which may from time to time afterwards be adopted affecting licensed territory. For this it is only necessary to refer to clauses 5, 11, and 24, of the regulations, the conditions of sale, and the terms of the



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license itself, and the conditions inserted in the several licenses granted from time to time to the appellant or his predecessors, which, from three in form A, were increased to six in form B, and seven in form C (appeal book, part II., pp. 21, 24). More than this I doubt whether the Crown could be bound to, having regard to the stringent terms of the statute, which seem to require that at the end of each license year the licensed territory shall be free to be dealt with again.

I may refer to the cases of *McArthur v. Northern and Pacific Junction R. W. Co.* (1890), 17 A. R. 86; *Muskoka Mill and Lumber Co. v. McDermott* (1894), 21 A. R. 129, in which these questions were to some extent considered.

I notice a case of *McArthur v. The Queen* (1885), 10 O. R. 191, before Proudfoot, J., on demurrer, not cited, in which, perhaps, a larger view of the right of the party against the Crown is implied, but that was really a petition to direct the issue of a first license on the original application, and the point really decided was that, under the circumstances, the petitioner was not affected by laches. No reference seems to have been made to the statute.

The case was argued as if by the purchase, as it is called, of the berth or limit, the licensee acquired some title to or ownership of the timber beyond that which by virtue of the Act the license conferred upon him for the time it was in force. That contention cannot, in my opinion, be supported. The right acquired was to cut, during the term of the license, timber belonging to the Crown. That timber, when it was cut, and not until then, became the property of the licensee, as provided by the Act. When a new license was granted the Crown was dealing with its own property and not the property of the licensee, and might require such license to be accepted upon such regulations, conditions, and restrictions, as were then in force, and as might, under the Act, have been lawfully adopted by the Lieutenant-Governor in Council. We cannot read the Act without seeing that it has all along been the intention of the Legislature that the Crown (or the Province, if you

will), should not be hampered in its dealings with this great source of its revenue, but should be left free to deal with it as changing circumstances, whether personal to the licensee or otherwise, might demand, and with regard to what might from time to time be deemed the best interests of the public.

With these views I approach the regulations of December, 1897, and the Act, 61 Vict. ch. 9 (O.), which approves them.

These regulations were of so important a character and introduced so marked a change of policy in dealing with Crown timber that it is not surprising that the Lieutenant-Governor in Council deemed it advisable that they should not come into operation except under the authority of the Legislature. Whether they are such as might have been adopted under the Crown Timber Act without such authority it is not necessary to decide. It may be argued that that Act confers no power upon the Lieutenant-Governor in Council to make regulations affecting the rights of property which the Act itself declares the licensee shall have in the timber cut. But that is not now the question. The condition complained of is imposed by the authority of the recent Act, 61 Vict. ch. 9 (O.), and the question is whether that Act applies and is valid.

We are dealing with a Provincial Act, and we have only to enquire whether the subject with which it is concerned is within the powers of the Legislature, and (2nd) whether the language employed is effective for the purpose contended for by the respondent.

I am unable to agree that the Act is *ultra vires* as infringing upon the powers reserved to Parliament by the British North America Act, sec. 91 (2), for the regulation of trade and commerce. The ground on which it is said to do so is that by requiring the timber to be manufactured into sawn lumber in Canada, the Act indirectly prohibits its exportation to foreign countries in any other than its manufactured state.

Whether this objection would be valid if the Act pro-

Judgment.

OSLER,  
J.A.

Judgment.

OSLER,  
J.A.

fessed to deal generally with timber which had become the property of private persons or corporations free from any condition on which it had been acquired from the Crown, might admit of argument, but if I am right in my view that the Legislature was dealing with the public property of the Province and dictating the terms on which it might be acquired, I think that it is not well founded.

The Act does not in terms purport in any way to regulate trade and commerce, though trade and commerce may be incidentally affected by the business conditions which arise out of its operation, just as they may be by provincial legislation affecting property and civil rights in the Province or dealing with other subjects assigned to the exclusive jurisdiction of the Provincial Legislature, and which, as Lord Herschell expresses it, incidentally involves some fetter on trade and commerce, but is not concerned directly therewith for the purpose of regulating it.

In disposing of its own property, I conceive that the Legislature, to which is assigned, by section 92 (5) of the British North America Act, exclusive jurisdiction over the management and sale of the public lands belonging to the Province and of the timber and wood thereon, must necessarily have power to prescribe that the licensee shall observe the conditions and regulations which may be attached to its acquisition.

The great sources of provincial revenue consist of mineral, and pine and spruce lands, and to hold that such legislation as is here in question is legislation affecting trade and commerce, would be to restrict and interfere with the rights of the Province to dispose of its own property, whether it be timber or minerals, or whatever it may be, in such a way as best to advance the general interests of the Province by encouraging manufactures, promoting settlement, establishing saw mills, pulp mills, or smelting mills, or in other ways improving the economic conditions of the country.

I am also of opinion that the Act applies to every

license to be issued after the 30th of April, 1898, and that the first regulation thereby approved is not restricted to the case of licenses issued after that date in respect of "sales of pine timber limits or berths" and renewal of licenses mentioned in the first section of the Act.

Judgment.

OSLER,  
J.A.

That section came into force on the passing of the Act (17th of January, 1898), and affects sales made after that date and before the 30th of April, licenses under which would expire, according to the long established practice of the department, on the 30th of April of that year. The second section of the Act, which approves the regulations, applies in terms to every license issued after the 30th of April. The Act is not very cautiously worded, in its very first line appearing to recognize a practice not authorized by law "the sales of timber limits or berths," and but for the fifth regulation which specially excepts certain territory which had been licensed under the sale of 1890, I should have felt more difficulty than I do in arriving at a conclusion, because the postponement of the operation of the second section of the Act might be thought to relate to licenses issued after the expiration of licenses which had been granted under the first section for any broken period of the year up to the 30th of April in respect of such sales as are therein mentioned. Considering, however, that every license is a new and independent license and that the exception of the sale of 1890 from the operation of the regulations would have been wholly unnecessary had they not been, as in terms they purport to be, of general application, I think that the licenses applied for by the petitioner must be held to be within them and that his action and appeal therefore fail.

I may add with reference to the application made by Mr. Scott at the trial to amend the petition, which was renewed *quia timet* before us on the appeal, that it seems to have been acceded to by the learned trial Judge, as I should infer from his judgment. If it was not then disposed of, however, I think it ought now to be allowed *quantum valeat*.



Judgment. MACLENNAN, J. A.:—

MACLENNAN,  
J.A.

Notwithstanding the able and elaborate argument of Mr. Scott, I am clearly of opinion that this petition was properly dismissed. I might content myself with saying that I agree with the judgment pronounced at the trial by my brother Street, for I think he has dealt satisfactorily with everything which has been urged by the suppliants before us; but as the case is of considerable importance, I will state the grounds of my opinion as they have presented themselves to my mind. I need not pause to make a statement of the facts of the case, or of the statutes and regulations affecting the licenses in question, for they are very fully stated in the judgment appealed from.

The timber in question is timber standing upon land within the Province of Ontario, declared to be the property of the Province by the British North America Act, sec. 109, of which no part, or any interest therein, can be sold or disposed of otherwise than as prescribed by statute. The suppliant must, therefore, in order to succeed, establish that he has acquired the right which he claims by proceedings authorized by the Legislature of Ontario. No act of the government, or of any officer of the government will do, unless authorized by, and done in accordance with, the Acts of the Legislature.

The law which existed when the licenses in question were issued, and were renewed from time to time, down to the last renewal in 1897, was one which was first enacted more than fifty years ago, and which has been in force without alteration ever since. The original Act was 12 Vict. ch. 30, and when the licenses in question were last renewed the Act was R.S.O. (1887) ch. 28. Section 1 authorizes the Commissioner of Crown Lands to grant licenses to cut timber on the public lands at such rates, and subject to such conditions, regulations, and restrictions, as may from time to time be established by the Lieutenant-Governor in Council; and section 2 declares that no license shall be so granted for a longer period than twelve months from

the date thereof. Now there is not, and there has never been, during fifty years, any enactment in any way qualifying or limiting that plain declaration of the Legislature, that no license shall be for a longer term than twelve months, and the law has been re-enacted during that period three different times. How absolute the intention of the Legislature was, and has been, in thus limiting the duration of licenses, appears from section 3, which defines the rights which the license was intended to confer. It conferred the right to take and keep exclusive possession of the land, subject to regulations, etc., and vested in the licensee all rights of property in all trees, timber, and lumber, cut within the limits of the license *during the term thereof*, the right to prosecute trespassers, and to recover damages; and further declared that all proceedings pending at the expiration of any such license might be continued to final termination, *as if the license had not expired*. I think the Legislature could hardly have used more clear, unambiguous, emphatic language to express its intention, that there should be no licenses for a longer period than twelve months, that at the end of that time they should expire, and that the rights in the timber, etc., vested in the licensee, were confined to the timber cut during the term of the license. The licenses issued to the suppliants and others under this enactment have always been in exact accordance with its terms. They have always been for a term not exceeding twelve months, terminating on a day certain, which for many years has been the 30th of April, *and no longer*. Such is the language of the statute, and such is the title which has been granted to and accepted by the suppliants in pursuance thereof. They contend, however, that the clear language of the Legislature, and of the license issued in pursuance thereof, is to be qualified by the regulations, particularly regulation 5, and by the practice of the land department for many years of granting renewals annually to the previous licensee. Regulation 5 provides that license holders who have complied with all existing regulations shall be

Judgment.

MACLENNAN,  
J.A.

Judgment. entitled to have their licenses renewed on application, and  
MACLENNAN, regulation 11, that all licenses shall expire on the 30th of  
J.A. April next after the date thereof, and that renewals are to  
be applied for and issued before the 1st of July following  
the expiration, on default whereof the right to renewal  
shall cease, and the berth shall be treated as forfeited.  
The original regulations of the 5th of September, 1849,  
*Canada Gazette*, vol. 8, p. 6999, are expressed differently.  
Regulation 8 declares that licensees who have complied,  
etc., will be considered as having a claim to the renewal  
of their licenses in preference to all others on application,  
etc., failing which the limits are to be considered vacant, etc.  
A change was made on the 23rd of June, 1866, since which  
the regulation relating to renewal has continued to be in  
the form approved of on the 16th of April, 1869. The  
question is whether these two regulations were intended  
or can be held to weaken or qualify the clear terms of  
the statute, and to confer a right not expressed in the  
license itself, and I think it impossible so to hold. In the  
first place it was not so intended. The second clause of  
the order in council expressly refers to the *requirements*  
*of the statute*, as matters which were to govern licenses  
and renewals thereof, as well as the regulations, conditions,  
and restrictions, which were then being ordained. Again,  
by regulation 24, the exact form of the license is pre-  
scribed, and in the form the term is expressed to be from  
its date to the 30th of April *and no longer*; and there is  
not a word in it about renewal. I think, therefore, the  
intention of the regulations is to comply with, and not to  
qualify, the statute. But if the regulation is not in  
accordance with the statute, if it assumes to confer a right  
of renewal, it must give way to the statute, and can confer  
no right beyond what the statute authorized the Land  
Commissioner to grant, and that is a license for a term  
not exceeding twelve months. The regulations which the  
Lieutenant-Governor in Council was authorized to estab-  
lish were in respect of licenses which were not to exceed  
twelve months in duration. So far as they go beyond

that they cannot bind the Crown. I think the regulations in question were ordained, merely for the guidance of the officials of the land department, and not for the purpose of conferring any contractual or other right of renewal upon licensees, which they could enforce against the Crown. It was contended that the practice of the department since 1866, of disposing of limits by auction, whereby large sums were obtained by competition, by way of bonus for the right of obtaining a license, and the long and uniform practice of the Crown to grant renewals year by year to the previous licensee, authorize and require a construction of the statute which would oblige the Crown to grant renewals. I cannot accede to that contention. The practice of the Crown has no doubt been to grant renewals, but the new license has always been expressly for twelve months *and no more*, and no instance has been shewn in which the Crown has granted a renewal, as upon an obligation to do so, or otherwise than in exercise of the statutory power to grant a license for the authorized limited time. In my opinion, the language of the statute is too clear to admit of any qualification of its terms by any usage however long or uniform: *The Queen v. Archbishop of Canterbury* (1848), 11 Q. B., at p. 581; *Dunbar v. Roxburghe* (1835), 3 Cl. & F., at p. 354.

Judgment.

MACLENNAN,  
J.A.

The question whether the holder of a license can compel the Crown to renew it, has not, so far as I am aware, ever been determined in any case to which the Crown was a party; but it has arisen and has been decided in other cases, and is, I think, no longer open for discussion in this Court. In *Contois v. Bonfield* (1875), 25 C. P. 39, it was held by the full Court of Common Pleas, that the right of renewal could not prevail against a grant of the land by the Crown; and that was affirmed by this Court unanimously in *S. C.* (1876), 27 C. P. 84. The question arose again in *McArthur v. Northern and Pacific Junction R. W. Co.* (1890), 17 A. R. 86; *Shairp v. Lakefield Lumber Co.* (1890), 17 A. R. 322, 19 S. C. R.



Judgment. 657; and *Muskoka Mill and Lumber Co. v. McDermott*  
**MACLENNAN,** (1894), 21 A. R. 129, and was determined in the same way.  
**J.A.**

I am, therefore, of opinion that the suppliants have no contractual or other right, as licensees, to compel the Crown to renew their licenses.

In the present case the Commissioner was willing to grant renewals, but, subject to a new condition, called the manufacturing condition, which, however, the suppliants refused; and if, as I think, they have no right to compel a renewal on any terms, that would dispose of this appeal. But the question of the legality of that condition as applicable to renewals, or even to licenses issued for the first time, was raised and discussed before us and I will therefore consider it.

That condition requires that logs cut under license shall be manufactured in Canada. The regulations imposing it were approved of by order in council on the 17th of December, 1897, while the suppliants' licenses were current. The first regulation requires that every license issued on or after the 30th of April, 1898, shall contain and be subject to the manufacturing condition. Regulations 2 and 3 make provision for the enforcement of the first condition, in the event of its not being observed, by suspension of the license and seizure of the logs. Regulations 4 and 5 do not require to be considered; and regulation 6 provides that none of them shall come into force until affirmed by an Act of the Legislature. Such an Act was passed, 61 Vict. ch. 9 (O.), on the 17th of January, 1898. By section 1 it is enacted that all sales of pine timber limits by the Commissioner of Crown Lands, which shall be hereafter made, and all licenses to cut pine timber on such limits thereafter granted by the Commissioner, shall be made and granted subject to the condition in the first regulation last above mentioned, that is, the manufacturing condition. Section 2 approves of the whole of those regulations. Section 3 confers power upon the Lieutenant-Governor in Council to make any further or additional regulations to carry into effect the object and intent of those approved of by section 2, and section 4 declares that section 1 of the

Act shall come into force at the passing thereof, that is, on the 17th of January, 1898, and the other parts on the 29th of April, 1898. It is contended that the effect of the Act is to confine the application of the manufacturing condition to licenses issued in pursuance of new sales, that is, sales made after the passing of the Act, and that it is not to be applied to renewals of licenses then current. I think such is clearly not its effect. The Act does make a distinction between the two classes of licenses, but the distinction is this: What the manufacturing condition was intended to effect was to prevent the exportation of logs in an unmanufactured state. Regulations 2 and 3 might be held to apply to existing licensees, and to prevent them from exporting logs cut in good faith, with the intention of doing so, which would be harsh and unjust; therefore, as to existing licenses, the new condition is not to apply to them, the holders thereof might export all logs cut during their currency, and until they expired. It is otherwise in the case of sales made after the passing of the Act, and licenses issued in pursuance of such sales. These new licensees may not export their logs at all. What the first section of the Act says, is that all new sales, and all licenses issued in pursuance thereof, shall be subject to the condition mentioned in the first regulation, that is, the manufacturing condition, not that they shall be subject to that regulation itself, which, as well as the subsequent regulations, is not to come into force until the 29th of April. It is impossible to restrict the application of the regulations to the case of new sales, for in plain terms they are made applicable to every license which shall be issued on or after the 30th of April, 1898.

I am, therefore, clearly of opinion that these new regulations are applicable to the licenses applied for by the suppliants on or after the 30th of April, 1898, in renewal of those formerly held by them, and that they are not entitled to them free from the manufacturing condition.

It was also contended that the Act imposing the manufacturing condition is *ultra vires* of the Legislature of the

Judgment.  
MACLENNAN,  
J.A.

**Judgment.** Province, as an interference with trade and commerce,  
**MACLENNAN,** by in effect prohibiting the exportation of logs to  
**J.A.** foreign countries. The argument on which I think Mr. Scott principally relied was the great extent of the trade in logs and lumber derived from the public lands of the Province. I do not perceive, however, that the question **can** be affected or determined by that consideration. The question is simply whether the Province can sell its timber, which it is free to sell, or not to sell at all, subject to a stipulation that it shall be manufactured within any prescribed area. I am at a loss to see how such a stipulation can be regarded as an interference with trade and commerce, within the meaning of the British North America Act.

In my opinion the appeal must be dismissed.

Moss, J. A. :—

I agree that the appeal fails. Mr. Scott's first contention on behalf of the suppliants is that they are in substance the owners of the timber comprised in the limits or berths described on the back of the licenses which from time to time have been issued to them ; and that upon their compliance with existing regulations and payment or tender of the ground rent and dues for any year they are entitled to demand a license for that year. He insists that the suppliants hold such a position with reference to these limits or berths, that if specific performance was a form of relief which could be awarded against the Crown they would be entitled to a judgment of that nature.

The documents which the suppliants produce in evidence of their title do not carry upon their face the proof of these positions. They are nothing more than permits to cut timber from season to season, and then only during the term expressed in them, which in every instance ends with the 30th of April. They contain nothing to shew a right to a continuance or reissue for any term beyond that specified in them. They begin with a day named and continue until the following 30th of April, and no longer.

The suppliants' contentions in this behalf are only to be maintained, if maintained at all, upon the statutory enactments, in and through which the Legislature of the Province has declared its will with regard to that part of the public domain which consists of timber upon the ungranted lands of the Province and the regulations under them.

Judgment.

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Moss,  
J.A.

The Commissioner of Crown Lands or the Department of Crown Lands acts under delegated powers conferred by the statute governing the sale and management of timber on public lands.

These powers are prescribed and regulated by the statute, and to it must recourse be had in every case when it becomes necessary to ascertain what may and what may not be done in regard to the public timber.

I fail to find in the statute any warrant for the suppliants' contention. On the contrary, I think it is thereby made very plain that the authority to give or grant a right to any one to cut timber upon the public lands of the Province for the purpose of manufacturing it into logs, lumber, or square timber, is limited to the grant of a license for a period of twelve months from the date thereof.

The provision is expressed in no uncertain language. It is prohibitory and imperative. "The Commissioner of Crown Lands or any officer \* \* may grant licenses to cut timber on the ungranted lands of the Crown at such rates and subject to such conditions \* \* ," but "No license shall be granted for a longer period than twelve months from the date thereof."

The statute then defines the rights of the licensee in language clearly shewing that they are limited by the duration of the term or period of the license.

These enactments indicate an intention to retain the entire right to and control over all timber not cut during the term of a license, and over the grant of licenses from year to year, and the power to withhold from the licensee of one year any claim whatever to the issue to him of a license for the next or any future year.



**Judgment.**

Moss,  
J.A.

We are not troubled with any question of the policy of this, though probably many good reasons may be suggested in favour of the wisdom of placing the Commissioner and the Department in such a position that their action in granting or withholding licenses under any particular circumstances should not be the subject of question or enquiry outside of the Legislature. At all events the policy seems to have commended itself to successive Legislatures and administrations for nearly three-quarters of a century.

It is contended, however, that a different construction has been placed upon their powers and authorities by the Crown Lands Department or its political head, the Commissioner of Crown Lands, in some instances.

For this reliance is placed upon the regulations passed from time to time speaking of renewals of licenses and the practice of regarding the holder of licenses as entitled almost as of course to a new license each year provided he has complied with the regulations and made his payments.

If these could be considered as amounting on their face to an agreement with a person who at a sale of timber berths or limits is declared the purchaser, that he is to be entitled to have renewal licenses issued to him for as many years or seasons as he chooses to demand them, it is enough to say that an agreement for a renewal is something which the law has not empowered the Commissioner of Crown Lands or the Department of Crown Lands to enter into. It is not within the statute, which authorizes no more than the giving of a right to cut timber, and even that for a period not longer than twelve months.

The regulations must be construed as not intending to enlarge the rights of persons dealing in respect of timber beyond such as the statute authorizes, and no greater effect has been attributed to them by the Courts of the Province whenever it has become necessary to consider them.

The term "renewal" seems to be applied to licenses issued after the first. But in reality this is not an

accurate description. They are not in the nature of a restoration or revival of a right. Each is a new grant. It bears no necessary relation to the preceding license. It may or may not be couched in the same language and subject to the same conditions, regulations, and restrictions, as the former. It is not the continuance of an old or existing right, but the creation of a new original right.

If these be the proper conclusions the suppliants have shewn no ground for seeking the interposition of the Court.

I think the "manufacturing condition" applies to all licenses issued on or after the 30th of April, 1898, and as well to the case of limits or berths which had been the subject of previous licenses, as to limits or berths licensed for the first time, on or after that date.

The first clause of the regulations of the 17th of December, 1897, covers in the amplest manner every license or permit to cut timber issued after the 30th of April, 1898, and there is nothing in the subsequent clauses to cut down the generality of the words there employed or to indicate an intention to limit them, but rather the contrary.

These regulations were subject to the approval of the Legislature, and they were approved by the Act, 61 Vict. ch. 9 (O.). That Act received the assent of the Lieutenant-Governor on the 17th of January, 1898. All licenses theretofore issued were by their terms limited to expire on the 30th of April following, and in order to provide for the case of possible sales of pine timber limits or berths and the consequent issue of licenses to continue between the date of the sale and the 30th of April, 1898, the first section of the Act made provision for incorporating with them the regulations of the 17th of December, 1897.

The licenses to be issued in respect of such sales would terminate on the 30th of April, 1898, after which date all licenses are governed by the first clause of the regulations.

In order to give full effect to this intention, the first section of the Act was brought into force immediately, while the other sections came into force on the 29th of

Judgment.

Moss,  
J.A.

Judgment. April, 1898, in time to apply to every license to be issued on and after the following day.

Moss,  
J.A.

I do not think the Act is open to the objection that it is *ultra vires* the Legislature of the Province. To begin with the subject matter is one in relation to which section 92 of the British North America Act declares that the Legislature may exclusively make laws. The legislation is in relation to the management and sale of the public lands belonging to the Province and the timber and wood thereon. It is of an administrative and directory character with regard to that species of provincial property. It is applicable to those dealing with the Crown Lands Department in respect of timber upon the public lands.

And I see no reason for thinking that the Legislature may not, in respect of this property, do what any subject proprietor might do, when proposing to dispose of his property, viz., attach to the contract a condition not impossible of performance, or unlawful *per se*, or prohibited by any existing law.

I agree with what has been said by my learned brothers on this branch of the case.

I also agree that the suppliants' application for amendment should be dealt with as proposed by my brother Osler: see Consolidated Rule 929.

LISTER, J. A. :—

I agree.

*Appeal dismissed.*

R. S. C.

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## SCOTT V. MELADY.

*Sale of Goods—Statute of Frauds—Delivery—Acceptance.*

The defendants agreed orally to buy from the plaintiff ten thousand bushels of No. 2 Red Wheat, at \$1.12 per bushel, to be delivered f. o. b. a vessel to be provided by the defendants, who were to pay freight and insurance, and delivery was to be made to them on payment of a sight draft for the price. The captain of the vessel gave the plaintiff a bill of lading describing him as the consignor, and in it, under the heading "consignees" was written "Order of Bank of Montreal, advise Melady & McNairn (defendants)." A draft for the price, drawn by the plaintiff upon the defendants, was attached to the bill of lading and discounted, but the defendants refused to accept this draft :—

*Held*, that there was, upon these facts, no final appropriation of the wheat or delivery thereof to the defendants, and that the property therein would not pass to them until acceptance of the draft, or payment or tender of the price.

*Held*, also, that neither the shipment in the vessel provided by the defendants, nor the taking by the defendants of samples of the cargo for inspection, constituted an acceptance within the statute.

Judgment of STREET, J., affirmed.

APPEAL by the plaintiff from the judgment at the trial. Statement.

The action was tried at Chatham on the 18th of November, 1898, before STREET, J., who, on the 7th of December, 1898, gave, in the defendants' favour, the following judgment, in which the facts are stated :

STREET, J. :—

The action was brought to recover damages from the defendants for their refusal to accept 10,000 bushels of wheat alleged to have been sold by the plaintiff to the defendants, and to have been resold by him at a loss upon the defendants' refusal to accept.

My conclusion from the evidence, after hearing the parties, is that the contract was a parol one for the purchase by the defendants from the plaintiff of 10,000 bushels of unascertained number two red winter wheat, free on board a vessel at Chatham, where the plaintiff carried on business, bound for Montreal.

The defendants, who carry on business in Toronto, after some oral and written communications with the plaintiff,



Judgment. chartered a vessel called the "Iona" and sent her to  
STREET, J. Chatham, where the plaintiff loaded 10,000 bushels of wheat on her out of a larger quantity in his warehouse, and received from the captain a bill of lading shewing himself the consignor and having written upon it under the heading "consignees" the words "order Bank of Montreal, Montreal. Advise Melady & McNairn, Toronto." He then attached to it a sight draft on the defendants for the price of the wheat and delivered both documents to the Bank of Montreal at Chatham with instructions that they were to be given up to the defendants on payment of the draft.

When the "Iona" was in the Welland canal the defendants sent a government inspector to take a sample of the wheat for the purpose of inspecting it, with the view of ascertaining that it was up to the standard fixed by law for the grade known as "number two red winter wheat," that is to say "red winter wheat; wheat sound and reasonably clean weighing not less than sixty pounds to the bushel:" R. S. C. ch. 99, sec. 44; 55-56 Vict. ch. 23 (D.); Order-in-Council, 26th September, 1896, pp. XLVII. *et seq.* of statutes 60-61 Vict.; and Order-in-Council, 12th of October, 1898.

There was some delay in obtaining the report of the inspector and the "Iona" proceeded to Montreal.

The defendants, while waiting for the report, wrote to the plaintiff asking him to instruct the bank as a favour to hold the papers until the vessel reached Montreal so that they might get a certificate of the inspection and this the plaintiff did.

The inspector finally reported that the grade was "three extra" and the weight "fifty-eight pounds per bushel strong." Upon his examination the inspector said the grade "three extra" was not known in law and that the expression "strong" meant well up to the weight of fifty-eight pounds per bushel.

Upon receiving this report the defendants telegraphed to the plaintiff refusing to accept the wheat on the ground

that it would not grade on account of its lightness of weight. Judgment.  
STREET, J.

The cargo was eventually sold by or on behalf of the plaintiff at a heavy loss, to recover which this action is brought.

It is quite clear, I think, that there was no complete contract in writing between the parties. The price agreed on is not mentioned in any document at all. An invoice is put in but it is not referred to in any of the documents; the draft is referred to in the defendants' letter of the 8th of July, 1898, but it includes charges for insurance, and for an advance to the captain by the plaintiff on account of the draft, and for bank charges for the draft, and an allowance is made from the contract price of one cent a bushel towards the freight in accordance with an agreement which appears in the correspondence. Then it is admitted that the contract, if any, was originally made in a conversation between the parties, at which, as I have found, the quality of the wheat to be delivered was ascertained; the subsequent correspondence merely refers to the subject matter as "your wheat" or "the wheat."

The only reference to "number two red winter wheat" in the correspondence is in the defendants' letter of the 18th of June, 1898, to the plaintiff, and that merely by inference, and not directly, has any reference to the quality of the subject matter of the contract now in question.

Then again there is nothing in writing shewing a contract between the parties that the payment for the wheat was to be made in the manner in which the parties evidently agreed by parol that it should be made, namely, by the defendants paying the plaintiff's sight draft on them with the bill of lading attached, the possession and property in the goods remaining in the plaintiff and the bank for him until payment of the draft.

From the acts of the parties it is plain that this was the agreement between them but it is not mentioned in the correspondence. The writings, therefore, omit the descrip-

Judgment. tion of the subject matter, the price, and the terms of  
STREET, J. payment.

The plaintiff, however, contends that there has been an acceptance and receipt by the defendants sufficient to take the case out of the statute, and at the trial, without having an opportunity of fully considering the cases, I was inclined to agree with him. Further consideration, however, has satisfied me that I cannot so hold.

Apart entirely from the fact that the plaintiff retained the goods in his own control by taking the bill of lading payable to the order of his own agents, the Bank of Montreal, it is well established that a receipt of the goods by the carrier designated by the purchaser is not an acceptance of the goods under the statute, because the duty of the carrier is to receive merely and not to accept unless specially authorized to do so: *Smith v. Hudson* (1865), 6 B. & S. 431; *Taylor v. Smith*, [1893] 2 Q. B. 65.

Therefore, the receipt of the goods by the captain of the "Iona" on board his vessel, although the vessel was sent to Chatham by the defendants for the purpose of receiving the wheat, cannot be treated as an acceptance and receipt to satisfy the statute, unless it were an acceptance for the purpose of the contract as well, which, for the reasons given below, I think it was not.

There remains to be considered the effect under the statute of the taking by the defendants of the samples while the "Iona" was in the Welland canal; with regard to this if I were trying this case with a jury it appears from the cases that I should be bound to tell them that it was some evidence to go to them of an acceptance and receipt of part of the goods for the purposes of the statute. But sitting as a judge I hold without hesitation that there was no acceptance or receipt of the wheat or any part of it.

The samples were taken by the defendants in order that they might determine whether they should accept the wheat or decline it, in other words, to see whether it

complied with the contract or not, and as soon as they found that it was not up to the standard they rejected it.

Judgment.  
STREET, J.

The facts of the case upon this point are not in dispute, and I should be shutting my eyes to them were I to hold that the defendants ever accepted or intended to accept any part of the wheat in question in any sense of the word after seeing these samples and the inspector's certificate.

The quantity of grain in the samples was of no appreciable value and for practical purposes nothing more was done here than was done in *Taylor v. Smith*, [1893] 2 Q. B. 65. See also *Hunt v. Hecht* (1853), 8 Ex. 814. *Nicholson v. Bower* (1858), 1 E. & E. 172, shews that the intention with which the sample is taken is a question of fact. It would be otherwise if the sample had been taken after purchase for purposes other than those of mere inspection, as in *Hinde v. Whitehouse* (1806), 7 East 558; and *Gardner v. Grout* (1857), 2 C. B. N. S. 340.

If, however, I had been able to hold that the Statute of Frauds offered no objection to the plaintiff's recovery, I should still be unable to give judgment in his favour. It is abundantly plain that the wheat in question did not average at the most more than fifty-eight and one-half pounds to the bushel, and it was therefore not up to the standard and description of "number two red winter wheat." The plaintiff himself says that his own man who put it on board reported to him that it weighed fifty-eight and one-half pounds per bushel; the two inspectors who were called put it, one at fifty-eight the other at fifty-eight and one-half pounds, and no witness put it any higher.

The plaintiff seeks to get over this difficulty by insisting that the defendants not having inspected the wheat at Chatham, where the vessel was loaded, must be taken to have waived any inspection and to have accepted the wheat. If it had been the stipulation of the contract that the defendants should accept any part of the wheat when



Judgment. loaded on the boat at Chatham there would have been  
STREET, J. much force in this argument.

But this does not seem to have been their bargain at all. The plaintiff placed 10,000 bushels of wheat on board the "Iona" at Chatham and took the bill of lading in such a manner as to retain full control over the cargo until he should be paid for it. His intention clearly was not to part with either the property in, or the possession of, the wheat until his draft should be paid and he knew that it would not be paid before the vessel had left Chatham. There was, therefore, no obligation on the defendants to inspect the wheat at Chatham. They took samples at the earliest period possible after the voyage commenced and communicated the fact of their having done so as a matter of course to the plaintiff and upon knowing the result of the inspection they at once declined to take the wheat: Blackburn on Sales, 2nd ed., p. 141; *Wait v. Baker* (1848), 2 Ex. 1; *Browne v. Hare* (1853), 4 H. & N. 822; *Ogg v. Shuter* (1875), 1 C. P. D. 47; *Mirabita v. Imperial Ottoman Bank* (1878), 3 Ex. D. 164.

It was contended that the correspondence and evidence shewed that the defendants had resold the wheat in question and had thus precluded themselves from objecting to its quality. I do not think that the defendants had made any resale of this specific wheat and I accept their very reasonable explanation of the expressions used in their letters, namely, that they had contracts for the delivery by themselves of wheat and that they were anxious to get the wheat in question, assuming it to have been what they contracted for, in order to help them to carry out their own contracts.

I am of opinion upon the whole case, for the reasons I have given, that the action must be dismissed with costs.

The appeal was argued before BURTON, C. J. O., OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 17th and 20th of November, 1899.

*Aylesworth*, Q.C., and *Rankin*, Q.C., for the appellants. **Argument.**  
 The terms of the contract are shewn in the letters and other documents and the statute is satisfied: *Chapman v. Larin* (1879), 4 S. C. R. 349; *Christie v. Burnett* (1886), 10 O. R. 609; *Martin v. Haubner* (1896), 26 S. C. R. 142. By the terms of the contract delivery was to be made in Chatham and the delivery to the defendants' agent there was effectual: *Marshall v. Jamieson* (1877), 42 U. C. R. 115; *Trent Valley Woollen Manufacturing Co. v. Oelrichs* (1894), 23 S. C. R. 682; *Clark v. Rose* (1870), 29 U. C. R. 302. There was no condition as to inspection and the wheat delivered was of the quality bargained for. At any rate this is not a ground of defence, but of counterclaim: *Thomson v. Dymont* (1886), 13 S. C. R. 303; *Towers v. Dominion Iron and Metal Co.* (1885), 11 A. R. 315.

*Charles Millar*, for the respondents. There is not a sufficient memorandum to satisfy the statute. The main question in dispute between the parties, namely, whether the wheat alleged to have been bought was "wheat" or "winter wheat," or "No. 2 red winter wheat," is not settled, and this is in itself a fatal difficulty. Neither is there any acceptance. That is a question of intention and the evidence is all one way as to that. The wheat was to be of a specified quality and not being of that quality the defendants were entitled to refuse delivery.

*Rankin*, in reply.

March 27th, 1900. The judgment of the Court was delivered by

OSLER, J.A. :—

The action is brought in respect of an alleged contract for the sale of a quantity of wheat. And the question is whether there is evidence of the contract sufficient to satisfy the requirements of the 17th section of the Statute of Frauds.

A parol contract was proved for the sale of 10,000 bushels

Judgment.

OSLER,  
J.A

of No. 2 red winter wheat (unascertained) at \$1.12 per bushel. The plaintiff goes so far as to say in one part of his evidence that the contract was for the sale of wheat *simpliciter*, not of any specific description or quality, but I am of opinion, looking at his own evidence, that the wheat which he was, on the 25th and 26th of May, proposing to sell to the defendants, at first in Toronto and finally on the latter day in Montreal where the bargain was finally closed, was wheat of the same description as that mentioned in his telegram of a few days earlier, in which he invited an offer for "ten to twenty cars No. 2 red winter or 10,000 bushels." The defendants' evidence makes this perfectly clear and there seems no reason for refusing it credence.

A further term of the contract was that the wheat was to be delivered f. o. b. at Chatham, where the plaintiff resided, on a vessel to be provided by the defendants, who were also to pay freight and insurance. But it was only to be delivered to the defendants in Montreal upon payment of a sight draft for the price. That the latter was a term of the parol bargain is to be inferred from what was done by the plaintiff and assented to by the defendants rather than from anything which was expressly said on the subject.

The plaintiff took a bill of lading from the captain of the vessel in which he was himself described as the consignor, while under the heading consignees is written "order Bank of Montreal, Montreal. Advise Melady & McNairn, Toronto."

A draft for the sum of \$11,213.95, drawn by the plaintiff upon the defendants, was attached to the bill of lading, discounted by the plaintiff at the Bank of Montreal agency in Chatham, and sent forward to the head office of the bank in Montreal. Under these circumstances it is clear that there was no final appropriation of the wheat or delivery thereof to the defendants, and that the property therein would not pass to them until acceptance of the draft or payment or tender of the price: *Shepherd v. Harrison*

(1869), L. R. 4 Q. B. 196; *Ogg v. Shuter* (1875), 1 C. P. D. 47, 50; *Mirabita v. Imperial Ottoman Bank* (1878), 3 Ex. D. at pp. 167, 72; *Calcutta and Burmah Co. v. DeMattos* (1863), 32 L. J. Q. B. 322-28; Campbell on Sales, 2nd ed., pp. 374, 375. When the defendants refused the wheat on the ground that it was not what they had agreed to buy, it was still in the possession and control of the plaintiff or his bank, and it was sold in Montreal by his instructions. The action is, therefore, properly brought as for a refusal to accept, and not for wheat sold and delivered.

Judgment.

OSLER,  
J.A.

After the parties had arrived at their parol agreement on the 26th of May, a good deal of correspondence passed between them, chiefly on the subject of the ship and matters collateral to it, but in none of the letters am I able to find anything from which the description of the subject matter can be ascertained, or the price, or the terms of payment. It was contended that the price was ascertained or ascertainable because in the defendants' letter of the 9th of July, the draft and bill of lading are referred to, but the amount of the draft was arrived at by deductions and additions, one of which at least, viz., the charge for the draft, is not alluded to in the correspondence, and formed no part of what was agreed to be paid so far as is shewn.

It was, however, contended that even if there were no written memorandum of the bargain the buyers had accepted part of the goods sold and actually received the same so as to satisfy the other alternative of the 17th section.

It is clear that the receipt of the wheat by the captain of the vessel, though a vessel provided by the purchaser, was not an acceptance and receipt within the meaning of the statute, for, first, he was not authorized to accept it for the purpose of the contract or for any purpose except that of carrying it to its destination; and second, the plaintiff retained the wheat in his own control by the terms of the bill of lading and never intended to part with its



Judgment. possession or the property therein to the defendants except  
OSLER, upon payment of the price.  
J.A.

I also think that the learned Judge rightly dealt with the other fact relied on by the plaintiff as constituting an acceptance and receipt, viz., the taking by the defendants of samples of the cargo from the vessel, which then was lying in the Welland canal.

As he says, the quantity of grain in these samples was of no appreciable value ; it was taken for the purpose of inspection merely and of ascertaining before the wheat reached Montreal whether it was up to the grade required by the contract. As soon as the defendants learned from the inspector's certificate that it was not, they gave notice to the plaintiff that they would refuse to accept it and they did without delay reject it on the ground that it was not up to the standard, as was in fact abundantly proved.

I agree with the learned Judge that the facts of the case on this point are not in dispute and it would be to shut our eyes to them to hold that the defendants ever accepted or intended to accept any part of the wheat after seeing the samples and the inspector's certificate. The case on this point is very like *Taylor v. Smith*, [1893] 2 Q. B. 65 ; and here, as there, the proper conclusion to be drawn from the facts is that there was no such dealing with the wheat by the defendants as to constitute an acceptance of it by them within the 17th section of the statute.

I need not refer to section 4 of the Imperial Sales of Goods Act and decisions thereon, as we as yet have no such Act in this country.

I do not think that the defendants were bound to inspect the wheat at Chatham. It was not to be paid for there nor was it delivered to them there, as has already been pointed out. It is not necessary to consider the evidence as to custom on this point, which is certainly not in the plaintiff's favour as far as it goes. On the whole I am of opinion that we should dismiss the appeal.

*Appeal dismissed.*

R. S. C.

HOOD V. COLEMAN PLANING MILL AND LUMBER  
COMPANY.

*Principal and Surety—Application of Payments—Mechanics' Lien—Practice—Judgment—Declaration of Right.*

The plaintiff endorsed a note in the defendants' favour as security for part of a larger debt due to them for work done on their debtor's property. The note was discounted by the defendants and was dishonoured and the holders obtained a judgment against the plaintiff which remained unpaid. Subsequently the defendants received in mechanics' lien proceedings a dividend of eighty-one cents on the dollar on their whole debt, including the portion secured by the note:—

*Held*, that they were not bound to apply the dividend first in satisfaction of the secured portion of their debt nor entitled to apply it first in satisfaction of the unsecured portion, but were bound to apply it *pro rata* on each part of the debt.

*Held*, also, that the plaintiff was entitled to a declaration of right in this respect, although he had paid nothing on the judgment.

Judgment of STREET, J., affirmed.

APPEAL by the defendants from the judgment at the Statement. trial.

The following statement of the facts is taken from the judgment of OSLER, J. A.:—

In the month of August, 1897, the Erie Jockey Club was indebted to the defendants in a sum of upwards of \$15,000 for work done in the construction of a building on their race course, and the defendants were pressing for payment. The club gave them its promissory note for \$5,000, dated 6th of August, 1897, payable in sixty days after date, on account of the demand, endorsed by the plaintiff and the other directors of the club for the accommodation of the principal debtors. This note the defendants endorsed to the Bank of Hamilton, and in December, 1897, the bank brought an action thereon against the plaintiff and one of the other endorsers in the Supreme Court of Erie County, New York. The defendants though not sued remain liable to the bank upon their endorsement.

After this, one Stewart brought against the club an action to enforce a mechanics' lien held by him on their property, in which action judgment was obtained on the 11th of December, 1897, directing the property to be sold

**Statement.** for the satisfaction of the lien holders, and referring it to the Master at Welland to ascertain and report the various persons who held mechanics' liens thereon. The property was sold on the 26th of February, 1898, and on the 5th of March, 1899, the Master reported that the defendants, among other lien holders, had proved a claim thereon to the amount of \$15,600 for debt, interest and costs; that the amount of their dividend or share of the purchase money in respect of the claim was \$12,262.29; and that the balance due on their debt proved was \$3,338.65. The defendants received "in meal or in malt" the amount of the dividend, and the plaintiff, as soon as this came to his knowledge, insisted that the dividend ought to be applied by the defendants in the first place in discharge of the note, and threatened that if the bank's action was proceeded with he would proceed against the defendants to recover the amount. Subsequently the bank obtained judgment and placed an execution in the sheriff's hands. Some correspondence passed between the parties and their solicitors, the result of which was that the sheriff was instructed to limit the demand upon the execution to the balance which remained due to the defendants, after giving credit for the dividend as distributed over the whole debt. The plaintiff then brought this action, in which he seeks to be indemnified against the judgment *in toto*, and prays for a declaration that the note was a first charge upon the dividend of \$12,262.29 received by the defendants, and for an order directing them to pay it out of that sum.

On the trial before STREET, J., the facts above stated appeared, and also that the plaintiff had paid nothing on account of the note or judgment.

The learned Judge held that the plaintiff and his fellow-endorsers had become sureties to the defendants, to the amount of the note, for so much of the debt owed by the Jockey Club to the latter; that the debt having been severed, the dividend received in the mechanics' lien proceeding was severable also, and that the plaintiff was entitled to have a due proportion of such dividend applied in reduction of the note.

Accordingly, having directed that all necessary amendments should be made in the pleadings, he gave judgment declaring that as between the parties to the action the plaintiff was entitled to have credited upon the note of \$5,000, the sum of \$4,025.60, being the proportion of dividend applicable thereto, and interest from the 5th of March, 1898, the date of the Master's report. Statement.

The appeal was argued before BURTON, C. J. O., OSLER, MACLENNAN, MOSS, and LISTER, JJ. A., on the 21st of November, 1899.

*Washington, Q. C.*, for the appellants. The judgment is based upon the erroneous assumption that the relationship of principal and surety existed between the parties. They were in law strangers to each other, and the plaintiff is not entitled to an apportionment of the amount received by the defendants in the lien proceedings: *Duncan Fox & Co. v. North and South Wales Bank* (1880), 6 App. Cas. 1.

*D'Arcy Tate*, for the respondent. The plaintiff became a surety for the payment of a portion of the debt due to the defendants, and not for the payment of the ultimate balance. There is, therefore, at the least, the right to have the dividend applied *pro rata* on the whole debt, including the portion covered by the note: *Gray v. Seckham* (1872), L. R. 7 Ch. 680; *Ex parte Holmes* (1839), Mont. & Ch. 301, at p. 316.

*Washington*, in reply.

March 27th, 1900. OSLER, J. A.:—

The case was at the trial converted into an action for a declaration of the rights of the parties in respect of the dividend, the plaintiff, having paid nothing on the note, not being entitled to any consequential relief.

It is clear upon the facts of the case that, apart from the form of the instrument, the note in question was endorsed by the plaintiff and his co-directors and



**Judgment.**

**OSLER,  
J.A.**

delivered to the defendants as a security to them for \$5,000, part of the debt of \$15,600, which the Jockey Club, the principal debtors, owed them. And if the note were now in the defendants' hands the plaintiff's right would not be doubtful. In the 7th edition of White & Tudor's L. C., vol. 2, p. 565, it is said: "Where a person is surety for a limited part of the debt, and has paid that part of the debt, he is entitled to receive the dividend which the principal debtor pays in respect of that sum, and the Court will order the payment to the surety of the future dividends on such sum, and will order the creditors to pay to the surety the proportion of any dividend they may have already received."

For these propositions it is only necessary to cite the cases of *Hobson v. Bass* (1871), L. R. 6 Ch. 792; *Gray v. Seckham* (1872), L. R. 7 Ch. 680; *Goodwin v. Gray* (1874), 22 W. R. 312. And if the surety had not paid the creditor, but the latter had already in his hands a portion of the dividend, which, if he had paid, the surety would have been entitled to receive from him as attributable to that part of the debt which he had guaranteed, the latter's right to apply it *pro tanto* upon his liability to the creditor must be equally clear.

The discounting of the note by the defendants with the bank was not a discharge or payment *pro tanto* of the debt of the Jockey Club; the defendants remained liable upon their endorsement of it to the bank, and upon its dishonour they had the right to rank as they did for their whole demand against the club to enforce their mechanics' lien which was the security they held therefor upon the property of their principal debtor. Had the dividend been large enough to pay their debt in full they concede that they would in that event have been bound to take up the note, and that the security given by the plaintiff would have been discharged. Therefore, in considering how the dividend ought to be applied, whether it is severable as the plaintiff contends, or not, I am unable to perceive what difference it makes as between the plaintiff and the

Judgment.

OSLER,  
J. A.

defendants that the bank was in fact the holder of the note when the dividend was actually received by the defendants. They have distributed it on their whole debt, treating it as a single debt, and concede that the plaintiff's liability upon the note must be limited to any balance due thereon after the application of the dividend in that manner, so that, according to the course they have themselves taken, it is merely a question of what is its proper application. I think the authorities shew that the contention of the plaintiff on this point is right. Mr. Washington contended that the plaintiff, as an endorser of the note, was not really in the position of a surety entitled to the benefit of a proportion of the dividend, and relied very much upon the well-known case of *Duncan Fox & Co. v. North and South Wales Bank* (1880), 6 App. Cas. 1. But it is distinguishable from the case in hand on the ground that the plaintiff's liability as one of the endorsers of the note of the Erie Jockey Club was from the outset that of a surety, the note having been given to and received by the defendants as security for so much as it represents of the debt the club owed them. The transaction of suretyship was not one which, as in the *Duncan Fox* case, arose simply out of the endorsement of the note, and which, therefore, as that case points out, would not be complete until the note had been dishonoured. Had the transaction been one of the latter kind the creditors' right to deal with securities of the debtor's estate in their hands held on general account during the currency of the note could not have been questioned by the endorser, for the latter's interest in them would arise when, and not till when, he became completely invested with the character of surety by the default of the maker of the note, and would be limited to such securities as happened to have remained in the hands of the maker. Here the plaintiff's interest in the security the defendants had as lien holders in the debtor's estate was contemporaneous with the contract of suretyship evidenced by the note.

I think that the appeal should be dismissed.

Judgment. MACLENNAN, J. A. :—

MACLENNAN,  
J.A.

I think this appeal must be dismissed, the authorities upon which its determination depends being perfectly clear. The justice of the decision becomes obvious when it is considered that if the plaintiff had paid the note, he would have been entitled to prove for it against the debtor's estate, and to receive a dividend for it; while the defendants could only have proved for the remainder, and have received a dividend proportionally less. Again, if the defendants had received the note as payment or in satisfaction of so much of the debt, they could not have proved for more than the remainder; in which case the plaintiff could have proved for the amount of the note, and have received a proportional indemnity.

Moss, J. A. :—

Upon the facts of this case the rights of the plaintiff appear clearly to be as declared by my brother Street.

The plaintiff was never bound to the defendants for more than that part of the debt of the Fort Erie Jockey Club (Limited), which was represented by the promissory note for \$5,000, which he had endorsed as surety for the club.

His liability to the defendants was limited to the amount of that note.

The defendants proved in the mechanics' lien proceedings for the full amount of their claim against the jockey club, including therein the \$5,000 note, and received a dividend equal to eighty-one cents on the dollar of the whole proof.

In the face of these facts it is difficult to see how the defendants can be heard to say that they were not the creditors of the Jockey Club in respect of the \$5,000.

The plaintiff is, therefore, to the extent of the proportion of the dividend attributable to the \$5,000 portion of the debt proved for, relieved from liability to the defendants.

I do not think the defendants can complain of a declaration to that effect and I am of opinion that their appeal should be dismissed.

Judgment.

Moss,  
J.A.

BURTON, C. J. O., and LISTER, J. A., concurred.

*Appeal dismissed.*

R. S. C.

### McMILLAN V. McMILLAN.

*Will—Construction—Inconsistent Clauses—Executory Devise—Failure of Issue.*

A testator, by the third clause of his will, devised a lot of land to a son, "his heirs and assigns forever," and in the fourth clause stated it to be "my will and desire, provided my (said) son shall have no lawful heir or children, that the above mentioned tract of land, after his death, that (the plaintiff) shall have it with all the right and title that my (said) son had to it heretofore." By the fifth clause he gave to his wife "the use" of half the lot, "during life; after her decease my will is that the same shall belong to my (said) son, his heirs and assigns forever." The son died after the testator without having had any children:—

*Held*, that the fifth clause removed from the operation of the third and fourth clauses one-half of the lot which vested in the son subject to the mother's life estate, while as to the other half the son had under the third clause an estate in fee simple subject under the fourth clause to an executory devise over in favour of the plaintiff, which, in the events which had happened, had taken effect.

Judgment of a Divisional Court, 30 O. R. 627, affirmed.

THIS was an appeal by the plaintiff from the judgment of a Divisional Court, reported 30 O. R. 627, in an action for the construction of a will, and was argued before OSLER, MACLENNAN, MOSS, and LISTER, JJ. A., and FERGUSON, J., on the 25th of January, 1900. The will in question is set out in the report below and the line of argument is there indicated.

Statement.

*R. Smith*, for the appellant.

*J. H. Moss*, for the respondent.



Judgment. March 27th, 1900. OSLER, J. A. :—

OSLER,  
J.A.

Reading clauses three and four of this puzzling will together, I think they point to a gift in fee simple to the testator's son Angus of the whole half lot, with an executory devise over to Duncan, another son, the plaintiff, in the event of Angus dying without leaving issue at his death. The words of the fourth clause "It is my will and desire, provided my son Angus McMillan shall have no lawful heir or children, that the above mentioned tract of land, \* \* after his death, that my son Duncan D. McMillan shall have it with all the right and title my son Angus McMillan had to it heretofore; provided that my son Duncan D. McMillan will come and take possession of the same six months after my son Angus McMillan's death," indicate to my mind that the failure of "heir or children" is a failure at Angus's death and not an indefinite failure of issue.

If these clauses stood alone Duncan would have title to the whole, the subsequent executory devise, in favour of the testator's grandson George, not having taken effect by reason of the plaintiff having "come and taken possession" within six months after Angus McMillan's death.

But clause five remains to be considered. Is it to be read as expressive throughout of the later mind of the testator, who had not up to this time made any provision for his wife, and who now withdraws from the operation of the earlier clauses one-half of the land he had hitherto dealt with, and proceeds to make a wholly new and independent provision with regard to it, devising it to his wife for life and then to Angus in fee simple absolutely; or, on the other hand, may it be regarded as a mere affirmation and restatement by the testator that subject to the widow's life estate he means to make no other change in the provision he had already made for Angus? *i.e.*, "after her decease my will is that the same shall belong, as I have already devised, to my son Angus McMillan, his heirs and assigns forever."

If the latter be the true interpretation the plaintiff

would still be entitled to recover the whole, the executory devise operating as before subject to the mother's life estate in one-half which has come to an end. But if the former, the defendant, as devisee of Angus, must prevail, the devise to him of the parcel mentioned in the fifth clause being unaffected by the executory devise in the plaintiff's favour. On the whole I favour the construction last mentioned which gives full effect to the latest clause of the three, which is in its own terms clear and unambiguous, and only conflicts with the former clauses by removing part of the estate from their operation leaving them in full force as to the residue.

The result is the same as that at which the Divisional Court arrived, and by the same process of reasoning, the only difference between us being that they treat the estate taken by Angus as an estate tail which terminated by failure of issue in fact at his death, the plaintiff thereupon taking in remainder.

Judgment.

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 OSLER,  
J.A.

MACLENNAN, J. A. :—

The first question is whether the devise to Angus, in the third clause of the will, is cut down to an estate tail by the operation of the fourth clause. Mr. Justice Robertson was of opinion that it was not, while the Divisional Court held that it was, on the ground that the words "have no lawful heir or children" in the fourth clause meant an indefinite failure of issue. I think, however, that the Divisional Court has overlooked the effect of the other words in the fourth clause which point to Angus's death as being the time of the failure of issue which was in the testator's mind. There are the words, "after his death," and also the proviso "that my son Duncan D. McMillan will come and take possession of the same six months after my son Angus McMillan's death," and the further proviso that if Duncan does not come and take possession, the land shall go to the grandson George in fee. I think these words and provisoes, taken together, clearly restrict the

Judgment. failure of issue to the time of Angus's death, and rebut the inference of an indefinite failure. If the words, "after his death," had stood alone, it might be doubtful, not being quite so strong as "at his death," or "on his death"; but the subsequent provisoes, in my opinion, remove all doubt. I refer to *Doe v. Frost* (1820), 3 B. & Ald. 546; *Ex parte Davies* (1851), 2 Sim. N. S. 114; *Parker v. Birks* (1854), 1 K. & J. at p. 165; and *Coltsmann v. Coltsmann* (1868), L. R. 3 H. L. 121, cited in 2 Jarman, 5th ed., p. 332. See also Theobald, 3rd ed., p. 501, citing *Trotter v. Oswald* (1787), 1 Cox 317, which, however, was a case of personal estate; and Hawkins, p. 207 (n2), where a number of American cases are cited. The effect, therefore, of clauses 3 and 4 is a devise to Angus in fee, with an executory devise over to Duncan in fee, in the event of Angus having no heirs of his body, or children, at the time of his death, and provided Duncan comes for possession six months afterwards, and if not over to George in fee. I say "heirs of his body," because it is the common case of all parties that "heirs" means "heirs of his body."

The remaining question is the effect of the subsequent clauses, and particularly of clause 5. By clause 5 the testator gives his wife an estate for life in the east half of the land, and adds: "After her decease my will is that the same shall belong to my son Angus McMillan, his heirs and assigns for ever." Although the life estate by the will is given in a later clause than the absolute disposition in fee previously made, it is not absolutely inconsistent with the previous gift, and is good, for the reasons given by Mr. Justice Robertson. But the effect of the gift to Angus is not so clear. In the previous clauses he had given him a conditional fee simple; and in this clause he gives him the east half absolutely and unconditionally subject only to the life estate of his mother. Does this indicate a change of intention, or is his meaning only that the estate which he had previously given, is not to be an estate in possession until the death of his wife? I cannot help suspecting that the latter was his intention. A very

slight change of phraseology would have made that clear. Judgment.  
 I think, however, the language he has used does not admit MACLENNAN,  
 of that construction. It is clear and distinct, that after his J.A.  
 wife's death, that part of the land shall belong to Angus,  
 his heirs and assigns for ever. The earlier clauses still  
 have their full force and effect upon the west half, but by  
 this clause he has done away with their effect upon the  
 east half. It is the latest expression of his mind. The  
 subsequent clauses, six and seven, seem to supply a reason  
 for that change of intention, for he imposes a personal  
 burden upon Angus, viz., the maintenance and support of  
 his unmarried sister, until she is married or otherwise  
 provided for, and also the maintenance and support of the  
 testator's own sister, for life, and the expense of her  
 funeral at her death. I am, therefore, of the opinion that  
 the judgment is right in declaring that the plaintiff is  
 entitled to the west half, and the defendant to the east  
 half, of the land.

If we could have held, with the Divisional Court, that  
 the effect of clauses three and four was to give Angus an  
 estate tail only in the land, the devise to Duncan would  
 also have been an estate tail, and clause five would then  
 have had its full effect given to it as a devise of the  
 ultimate remainder in fee in the east half, the ultimate  
 remainder in fee in the west half not being disposed of,  
 but descending as in case of an intestacy.

FERGUSON, J. :—

The clauses of the will that are material here are fully  
 set forth in the judgment of the learned Judge before  
 whom the action was tried, 30 O. R., at pp. 628 and 629.

Assuming that the testator was possessed of an estate  
 in fee simple in the lands, there can, I think, be no doubt  
 that by the third clause of the will he devised that estate  
 in fee to his son Angus.

Then as to the effect of the fourth clause : I think that  
 the words "no lawful heir or children" mean "no lawful



Judgment. heir of the body or children," in other words that the  
FERGUSON, J. word "heir" means, as it is used, "heir of the body." I think the passage from Jarman on Wills, 5th ed., p. 1175, quoted by the learned Chief Justice in delivering the judgment appealed from, if there were nothing more, would sufficiently shew this. It appears to me, however, that "default of heirs" in that passage, that is, default of heirs of the body, was and was assumed to be an indefinite failure of issue and that the devise over was one to take effect upon such indefinite failure.

The Queen's Bench Division seem to have assumed that the devise over in the present case is in the same position, a gift over upon an indefinite failure of issue of the son Angus, and that therefore the estate in fee given by the third clause was cut down by the provisions of the fourth clause to an estate tail. But, with all respect, I do not see that this can be so, for it is provided that the gift over is to take effect upon the death without issue of the son Angus. "After his death" are the words used, and upon the performance of a condition by the son Duncan, namely, to come and take possession of the land within six months after the death of Angus, the word "provided" used in the will being an apt word to express a condition. In default of performance of this condition by the son Duncan there is another gift, which, I think, may be called a gift over to the grandson George. I do not see that there can be much difference between the words "upon the death," "at the death" and the words employed—"after the death," but whatever difference there might be or be considered to exist seems to vanish when one looks in the present case at the subsequent provision or condition as to what was to be done within six months after the death. Then, if it be assumed that the gift by the words employed is in the circumstances the equivalent of a gift over to take effect "at the death," or "on the decease" of the son Angus, it seems clear that an indefinite failure of issue was not meant or intended, and that the estate in fee given by the third clause to the son Angus

was not cut down by the fourth clause to an estate tail, Judgment. and the cases *Ex parte Davies* (1851), 2 Sim. N. S. 114; *Ferguson, J.* *Doe v. Frost* (1820), 3 B. & Ald. 546; *Parker v. Birks* (1854), 1 K. & J. 156; and *Coltsmann v. Coltsmann* (1868), L. R. 3 H. L. 121; referred to in the judgment of Mr. Justice MacLennan, which I have had an opportunity of perusing, are authorities for this view.

I think the gifts over in the present case are executory devises or interests which spring up of their inherent strength upon the happening of the prescribed events and performance of the conditions, and that the estate taken by the son Angus, looking at the third and fourth clauses of the will only, was an estate in fee simple subject to be defeated by either of the executory devises.

The son Angus did die without children or heirs of the body and within six months after his death the son Duncan performed the condition by taking possession of the land. The executory devise to Duncan then took effect, defeating the estate in fee given to the son Angus and rendering it impossible that the gift to the grandson George could take effect. This executory devise to the son Duncan was a devise in fee and if the will had contained no provisions subsequent to the fourth clause respecting a disposition of this land or any part of it, the son Duncan would, as I think, undoubtedly be entitled to an estate in fee simple in the whole one hundred acres.

By the fifth clause of the will, however, a life estate in the east half of the land is given to the wife of the testator, and the remainder in fee of this same east half is given to the son Angus by unmistakable words. The testator's widow died and this remainder in fee to Angus fell into possession. And by his will Angus gave all his lands to his widow, the defendant, Margaret McMillan.

The case may now be stated thus: By the fourth clause of the will there is a gift to the son Duncan of the whole one hundred acres in fee simple, and by the fifth clause there is a gift to the son Angus in fee simple of the east fifty acres of the same land. These two gifts cannot stand

Judgment. together, and I think, as stated in the judgment appealed from, that the fifth clause should be considered as indicating a subsequent intention on the part of the testator, and that the gift in the fourth clause must give way so far as necessary to satisfy the gift in the fifth clause.

The result seems to be that there should be judgment declaring that the plaintiff is entitled to an estate in fee in the west half, and that the defendant is entitled to an estate in fee in the east half, of the land.

MOSS, and LISTER, JJ. A., concurred.

*Appeal dismissed.*

R. S. C.

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## STRUTHERS V. TOWN OF SUDBURY.

*Assessment and Taxes—Exemptions—“Public Hospital”—R. S. O. ch. 224, sec. 7 (5).*

A hospital carried on by and for the benefit of two medical practitioners, and used chiefly by patients paying fees, though to some extent by indigent patients, and in receipt of a government grant under “The Charity Aid Act,” R. S. O. ch. 320, is a public hospital within the meaning of sub-sec. 5 of sec. 7 of the Assessment Act, R. S. O. ch. 224, and exempt from taxation.

Judgment of MEREDITH, C. J., 30 O. R. 116, affirmed.

APPEAL by the defendants from the judgment of MERE- Statement.  
DITH, C. J., reported 30 O. R. 116.

The action was brought to determine whether the Sudbury General Hospital was entitled to exemption from municipal taxation as being a “public hospital” within the meaning of sub-sec. 5 of sec. 7 of the Assessment Act, R. S. O. ch. 224. The facts are stated in the report below.

The appeal was argued before BURTON, C. J. O., OSLER, MACLENNAN, MOSS, and LISTER, JJ. A., on the 17th of November, 1899.

*Wallace Nesbitt*, Q. C., and *J. H. Clary*, for the appellants. The hospital in question is carried on for private gain and is under private control with restrictions on the right to admission, and is not a “public hospital.” The exempting sub-section must be strictly construed, and its interpretation as to the words in question is aided by reference to the other exempted properties mentioned in it, all being held for general public purposes. The receipt of public aid is not the test; any possible private pecuniary gain destroys what might otherwise be the public character: *In re The Stockport Schools*, [1898] 2 Ch. 687; *Blake v. Mayor of London* (1886), 18 Q. B. D. 437; (1887), 19 Q. B. D. 79; *In re The Royal College of Surgeons*, [1899] 1 Q. B. 871; *Commissioners of Inland*



Argument. *Revenue v. Forrest* (1890), 15 App. Cas. 334. The test of the right to exemption is whether the tax, if paid, would be paid by the public to the public.

*Aylesworth*, Q. C., for the respondents. The element of charity has nothing to do with the right to exemption, and this is the fallacy of the appellants' argument. They confound "public" with "charitable." The test is not whether there would otherwise be payment from the public to the public, but whether there is by means of the exempted institution some benefit to the public. There must be some control of institutions of this kind, and some rules governing the right of admission, and it can make no real difference whether the control and management are exercised by private individuals or public officials. Under the Charity Aid Act the rules and regulations are subject to the approval of the Lieutenant-Governor in Council, and there is the right of inspection, and the hospital is clearly one in which the public have an interest: *Colchester v. Kewney* (1866), 35 L. J. Exch. 206; *Rex v. Yorkshire* (1802), 2 East 342; *Rex v. Bucks* (1810), 12 East 192.

*Nesbitt*, in reply.

March 27th, 1900. OSLER, J. A. :—

The action is replevin for taking a distress for taxes alleged to have been unlawfully assessed upon a public hospital.

The Assessment Act, R. S. O. (1887) ch. 193, sec. 7, provides that all property in this Province shall be liable to taxation, subject to the following exemptions, that is to say: "(5). Every public school house, town or city or township hall, court house, gaol, house of correction, lock-up house, and public hospital, with the land attached thereto, and the personal property belonging to each of them."

The question is whether the Sudbury General Hospital is entitled to exemption under this provision.

It is the private property of the plaintiffs, who are

practising physicians in the town of Sudbury, and all the profits and gains derived from its management are their own personal profits and gains.

Judgment.

OSLER,  
J.A.

The circumstance mainly relied upon as establishing the character of the hospital as a public hospital, in addition to the fact that a comparatively general and extensive relief for sick and poor is administered there, is, that it has been placed upon the list of institutions receiving provincial aid from public moneys under the Charity Aid Act, R. S. O. (1887) ch. 248.

One of the plaintiffs said that it was managed by him and his associate as a private institution until the end of December, 1894. In October of that year they made an application to the Government for aid under the Act and on the 26th of February and the 5th of March, 1895, after the building had been inspected by the inspector of prisons and charities, and on his recommendation, an order-in-council was passed, that, subject to the ratification of the order by the Legislative Assembly, the General Hospital, Sudbury, should be taken as named in Schedule A of the Charity Aid Act, and receive aid in accordance therewith from the 1st of January, 1895.

On the 21st of March, 1895, this order-in-council was ratified by the Legislative Assembly, and by force of section 43 of the Act the effect of these proceedings was to make the hospital as if it had been actually named in the schedule to the Act. Thereafter it received aid, according to the terms and provisions of the order-in-council and Act, for the years 1895 and 1896, and it became liable to be inspected and was inspected by the provincial inspector of prisons and charities and was reported upon by him to the Government in the same way as other institutions receiving similar aid, and it was governed and managed under rules, regulations and by-laws, approved by him, and, on his recommendation and approval, also approved by the Lieutenant-Governor in Council under the Act, section 15.

As, however, the learned Chief Justice in the Court below observes, the admission of patients is practically

**Judgment.**  
**OSLER,**  
**J.A.**

under the absolute control of the plaintiffs, subject only to such control as is, by reason of the hospital being aided under the Charity Aid Act, conferred upon the provincial authorities by the provisions of that Act.

The Assessment Act contains no definition of what shall constitute a public hospital. It is not necessarily an institution controlled or managed by an incorporated body. We have no reason to think that the Legislature meant to use the word "hospital" in the sense attributed to it by Coke, where he says, that there is no legal hospital except where the poor persons benefited are themselves incorporated, for he also denied that where the corporate succession was vested in trustees for the purposes of the institution there would be a legal hospital. The ordinary meaning of the word is a place for the relief of the sick, and we are to endeavour to ascertain when such a place may be said to be of a public character so as to entitle it to exemption. Other clauses of the exemption section do not throw much, if any, light on the subject. We cannot safely affirm that in order to be a public hospital it must be an institution under government or municipal control, or expound the term by the maxim *noscitur a sociis* by reason of its association with other words such as public school house, town hall, court house, public road, public square, etc. These are subjects in which the public are interested in a different sense and are the property of well-known public corporations, but these corporations have no power, that I am aware of, to establish or aid hospitals, except in the case of municipal corporations in a limited way under the Public Health Act, R. S. O. (1887) ch. 205, sec. 95, by establishing isolation hospitals.

We find in sub-section 4 of section 7 that every "incorporated seminary of learning" is exempt, which obviously includes an incorporated proprietary school.

In *Wylie v. City of Montreal* (1886), 12 S. C. R. 384, a private unincorporated school was held to be exempt under an Act which declared that "every educational institution

\* \* and the land on which they are erected, \* \* Judgment.  
shall be exempt from municipal and school taxes."

OSLER,  
J.A.

In sub-section 9 we find that, *inter alia*, any lunatic asylum is exempt, under which provision may well be included private lunatic asylums established under ch. 246 of R. S. O. (1887), public asylums being necessarily exempted as being vested in the Crown (ch. 245, sec. 2; ch. 193, sec. 7 (1) ); a road on which public money is expended becoming a public road: sec. 534 Municipal Act, R. S. O. (1887) ch. 184.

That an institution is established for private gain or is held in a private hand is not necessarily inconsistent with its being in its nature of a public character.

One meaning of the word is "open for the use, enjoyment, or participation of all, either free or on payment of a fee."

In *Attorney-General v. Pearce* (1740), 2 Atk. 87, the question was as to the meaning of the word "public" as applied to charities. Lord Hardwicke was of opinion that the word "public" was meant only by way of description of the nature of them, and not by way of distinguishing one charity from another. \* \* "The charter of the Crown cannot make a charity more or less public, but only more permanent than it otherwise would be, but it is the extensiveness which will constitute it a public one." This last characteristic is alluded to by each of the Judges of the Court of Appeal in their judgments in *Blake v. Mayor of London* (1887), 19 Q. B. D. 79. In the same case, in the Court below, Denman, J., referring to the exemption in favour of hospitals observes that a hospital "would not the less be entitled to exemption because certain fees were taken from rich persons who chose to take the benefit of the hospital." See also *Hall v. Derby Sanitary Authority* (1885), 16 Q. B. D. 163, and *In re Sisters of Charity* (1859), 7 U. C. L. J. 157.

In the present case the charitable element, if that were essential, is not wholly wanting, although it is not very prominently put forward. I find, however, nothing in



**Judgment.**

**OSLER,  
J.A.**

the Assessment Act, which, as in the Imperial Act, 5 & 6 Vict. ch. 35, sec. 61, restricts the exemption to the case of hospitals wholly or in part supported by charity.

The case is therefore distinguishable, as the learned Chief Justice pointed out, from *Needham v. Bowers* (1888), 21 Q. B. D. 436 ; which was decided under that Act. In the absence of any legislative declaration on the subject, and the words "public hospital" having no technical meaning or any precise legal meaning, it seems more reasonable to hold that they are used in their popular sense and that any institution which, though not in a strictly legal right, in a popular sense may be called a public hospital, may claim exemption : Harrison's Municipal Manual, 5th ed., p. 716. We here have a hospital, in which, as a building, hospital accommodation is provided for all in that part of the country who are able, to the extent of such accommodation, to take advantage of it. This accommodation is subject to the control and supervision of the Government on behalf of the public, and public funds are by statute contributed to its support. Had it been intended that the exemption should be confined to a corporate institution or one wholly or in part supported by charity, I think the Legislature would have said so, but, if there is nothing inconsistent in an institution owned by private persons and managed for their own gain, being a public hospital so far as the benefits and advantages conferred upon the public thereby are concerned, we may properly hold that the Sudbury General Hospital is a public hospital and entitled to exemption under the Act.

I agree, therefore, in affirming the judgment.

**MACLENNAN, J. A. :—**

I agree that this appeal must be dismissed.

It is not necessary to say what would be the proper conclusion but for the legislative recognition of the appellants' hospital under the provisions of the Act to regulate Public Aid to Charitable Institutions, R. S. O.

(1887), ch. 248. But having regard to that recognition, I think we ought to hold, as was done by the learned Chief Justice, that although in many respects the hospital is a private enterprise, the order-in-council, ratified by resolution of the Assembly, under statutory authority, has given to it a public character, which makes it a "public hospital" within the meaning of the exemption clause of the Assessment Act.

Judgment.  
MACLENNAN,  
J.A.

BURTON, C. J. O., MOSS, and LISTER, JJ. A., concurred.

*Appeal dismissed.*

R. S. C.

## TOWNSHIP OF ORFORD V. TOWNSHIP OF HOWARD.

*Drainage—Injuring Liability—Natural Watercourse—R. S. O. ch. 226, sec. 3, sub-sec. 3.*

Under sub-sec. 3 of sec. 3 of R. S. O. ch. 226, lands in one municipality from which water has been caused to flow upon and injure lands in another municipality, either immediately, or by means of another drain, or by means of a natural watercourse, may be assessed and charged for the construction and maintenance of a drainage work required to relieve the injured lands from such water.

*In re Orford and Howard* (1891), 18 A. R. 496; *In re Harwich and Raleigh* (1894), 21 A. R. 677; and *Broughton v. Grey and Elma* (1897), 27 S. C. R. 495, distinguished.

Judgment of the Drainage Referee affirmed.

THIS was an appeal by the Township of Orford from the judgment of the Drainage Referee, and was argued before OSLER, MACLENNAN, MOSS, and LISTER, JJ. A., on the 22nd of November, 1899. The point involved is stated in the judgment.

*Douglas, Q.C., and Shepley, Q.C., for the appellants.*

*Matthew Wilson, Q. C., for the respondents.*

Judgment. March 27th, 1900. LISTER, J. A. :—

LISTER,  
J.A.

This is an appeal by the Township of Orford from the judgment or decision of the Drainage Referee dismissing its appeal to him against the report, plans, etc., of Howard, in respect of the proposed improvement of the west branch of the Cranberry Marsh drain.

The townships of Howard and Orford adjoin, Howard being the lower and Orford the higher or upper municipality.

The drain is wholly within the limits of Howard and was constructed under the authority of a local assessment by-law by and at the cost of Howard.

Notice having been given to the council of Howard that the drain was out of repair, the council, by a resolution passed on the 6th of November, 1897, appointed Angus Smith, civil engineer, to prepare a report, etc., and make an assessment; and he thereafter made a report which bears date the 2nd July, 1898, which, with the plans, etc., that he had prepared, and the assessment that he had made, were laid before the council on the last mentioned date.

He reported that: "This drain will require to be deepened and widened to a considerable extent, so as to carry the waters brought to it by the Balmer Burley and Skakel award drain, and to give sufficient drainage to the surrounding lands"; and he thereby recommended that the drain should be improved so as to comply with the specifications which accompanied the report; and he estimated the cost of the proposed work, including engineer's and clerk's fees, etc., at the sum of \$355, which sum he assessed and charged against lands and roads in Howard only, as set forth in the schedule of assessment annexed to his report.

The council of Howard, instead of adopting the report, passed a resolution referring it back to the engineer for the purpose of considering the advisability of assessing other lands. The resolution is in these words: "Moved

by George Handy, seconded by A. F. Campbell, that the report of Angus Smith, civil engineer, on the improvement of the west branch Cranberry Marsh drain, be referred back to consider the advisability of placing more lands on the assessment. Carried."

Judgment.

LISTER,  
J.A.

On the authority of this resolution the engineer prepared and laid before the council another report bearing date the 5th of August, 1898, to which was attached another assessment schedule. By this report the work recommended by his former report was not changed. He estimated the cost of the proposed work, including engineer's and clerk's fees, etc., at \$377, which he assessed and charged against lands and roads in both townships as shewn in the assessment schedule attached to the report. Lands and roads in Orford were assessed for \$86 as for injuring liability, and lands and roads in Howard for \$291 as for benefit and injuring liability. On the 6th of August, 1898, the council provisionally passed a by-law in the usual form authorizing the construction of the work and the borrowing of the necessary funds to cover its cost, etc. A copy of the report, etc., was served on the respondents in conformity with the statute, and they appealed therefrom to the Drainage Referee who, after hearing the evidence, found as follows :

"I find on the evidence that water is caused to flow from the lands and roads in Orford into Howard and to injure the lands in the marsh or basin in the latter township, and that such Orford lands and roads are assessable for the proposed drainage work." Upon this finding the Referee gave judgment dismissing the appeal; and from this judgment the appellants now appeal.

The evidence shewed that the west branch of the Cranberry Marsh drain is, or at one time was, a marsh or swale, and parts of it may still be so described. This marsh or swale commences in the sixth concession of Orford and extends in a south-westerly direction in Orford, entering Howard in the sixth concession and extending thence in a south-westerly direction through Howard to



Judgment.

LISTER,  
J.A.

about the second concession of Howard. It is of unequal width and without any defined channel. The drain in question commences at a point in the bed of the swale between the north and south halves of lot 14 in the third concession of Howard and extends northerly and north-easterly to the east limit of lot 14 in the block of land between the second and third concessions of Howard. In the bed of the swale and commencing at the road in the sixth and seventh concessions of Orford and extending to the head of the drain in question, drains have been constructed, some by farmers and others under the Ditches and Watercourses Act, but all connected so that the waters are conducted thereby and discharged into the drain in question, and being insufficient to receive and carry off all the water thus brought into it, the lands of Howard were flooded and injured. In order to relieve the lands thus injured it was deemed expedient by the council of Howard to enlarge the west branch of the Cranberry Marsh drain; and to that end Howard initiated the proceedings complained of. And the engineer, assuming to act under the authority of sub-sec. 3 of sec. 3 of 57 Vict. ch. 56 (O.), R. S. O. ch. 226, assessed lands in Orford as for "injuring liability."

There was much evidence given as to whether the drains in Orford caused more of the water to flow from their lands into Howard than would naturally have found its way there. The Referee found that such was the effect of the Orford drains and I think the evidence sustains his finding.

The liability of the lands in the municipality of Orford to contribute as for "injuring liability" to the cost of the proposed work depends upon the construction to be given to sub-sec. 3 of sec. 3 of 57 Vict. ch. 56 (O.), R. S. O. ch. 226, which reads as follows:

"If from the lands or roads of any municipality, \* \* water is by any means caused to flow upon and injure the lands or roads of any other municipality \* \* the lands and roads from which the water is so caused to flow

may \* \* be assessed and charged for the construction and maintenance of the drainage work required for relieving the injured lands or roads from such water \* \* and such assessment may be termed 'injuring liability.'"

Judgment.

LISTER,  
J.A.

A brief review of the law as it was prior to this enactment may shed light on the intention of the Legislature in enacting it. The statute then in force was 55 Vict. ch. 42 (O.), "The Consolidated Municipal Act, 1892," and the section of that Act corresponding to sub-sec. 3 of sec. 3 of 57 Vict. ch. 56 (O.), is section 590, which is in these words:

"If a drain already constructed, hereafter constructed or proposed to be constructed by a municipality, is used as an outlet or will provide when constructed an outlet for the water of the lands of another municipality, \* \* or if from the lands of any municipality, \* \* water is by any means caused to flow upon and injure the lands of another municipality, \* \* then the lands that use or will use such drain when constructed as an outlet either immediately, or by means of another drain from which water is caused to flow upon and injure lands, may be assessed \* \* for the construction and maintenance of the drain so used or to be used as an outlet as aforesaid; or for the construction and maintenance of such drain or drains as may be necessary for conveying from such lands the waters so caused to flow upon and injure the same."

This question came before this Court in the case of *In re Orford and Howard* (1891), 18 A. R. 496, upon the construction of sec. 590, R. S. O. (1887) ch. 184, the section of that Act corresponding with section 590 of the Act of 1892. That case in its facts is very similar to the present case. There the surface waters of the upper municipality were caused to flow into a natural watercourse connecting with a drainage work constructed by the lower municipality in the bed of the creek. It was held that the section applied only to drains strictly so called, that is to artificially constructed outlets, and that a municipality from which surface waters flowed, whether by drains or by

Judgment. natural outlets, into a natural watercourse, could not be called upon to contribute to the expense of a drainage scheme merely because the natural watercourse was used as a connecting link.

LISTER,  
J.A.

Precisely the same question that arose in *In re Orford and Howard*, again came before this Court upon the construction of sec. 590, 55 Vict. ch. 42 (O.), in the case of *In re Harwich and Raleigh* (1894), 21 A. R. 677. The Court divided, Chief Justice Hagarty and the present Chief Justice being of opinion that where there is a drain constructed or improved by one municipality which affords an outlet either immediately or by means of another drain or natural watercourse for waters flowing from lands in another municipality, the municipality that had constructed or improved the outlet could, under this section, assess the lands in the adjoining municipality for a proper share of the cost of such construction or improvement; while Mr. Justice Osler and Mr. Justice Maclellan, following *In re Orford and Howard*, were of opinion that the section applied only to drains properly so called and not to natural watercourses which had been artificially deepened or enlarged. In the result the decision of the Drainage Referee, that section 590 authorized such an assessment, was affirmed. But in the case of *Broughton v. Grey and Elma* (1897), 27 S. C. R. 495; in which the same question was raised upon the construction of section 590, the case of *In re Orford and Howard*, and the opinions of Mr. Justice Osler and Mr. Justice Maclellan in *In re Harwich and Raleigh*, were approved, and it was held that sec. 590 of 55 Vict. ch. 42 (O.), applied only to drains properly so called and not to watercourses which had been deepened or enlarged. "A natural stream," said Mr. Justice Gwynne, who delivered the judgment of the Court (p. 502), "running through a municipality in which a drain is constructed by the municipality, and into which the waters brought down by the drain are discharged for the purpose of being carried off thereby, is no part of the drain constructed by the munici-

Judgment.

LISTER,  
J.A.

pality ; and lands in another municipality situate higher up on the same stream into which the lands in such municipality are also drained by drains discharging their waters into the same stream within the limits of the upper municipality, can in no sense be said to use a drain constructed by the lower municipality within its own limits, and which discharges its waters into the same stream, and therefore such lands are not by any of the Acts subjected to the obligation of contributing to the cost of the construction of a drain in the lower municipality from which, as not using it they do not, and cannot, derive any benefit." Again he said : " The whole scheme of the legislation upon the subject is that they who derive benefit from such a work, and they only, shall bear the burden of its construction and maintenance." And again, he said (p. 507) : " That drain never has been used as an outlet for waters on lands in Elma whether brought into the drain either immediately or by means of another drain, nor is it suggested that the drain so originally constructed when the work proposed to be undertaken shall be completed will provide such an outlet for any lands in Elma. What the by-law regards as an outlet for which the lands in Elma have been assessed plainly is the natural stream called Beauchamp creek as proposed to be deepened."

And now the question is again presented upon the construction of sub-sec. 3 of sec. 3 of 57 Vict. ch. 56 (O.), R. S. O. ch. 226 " The Municipal Drainage Act." Sub-sections 3 and 4 of this Act correspond to section 590 of the Consolidated Municipal Act, 1892. For the appellants it was argued that sub-sec. 3 of sec. 3 of 57 Vict. ch. 56 (O.), does not change or alter the meaning of section 590 of the Consolidated Municipal Act, 1892, as construed by the cases before cited, and therefore the liability of lands in an upper municipality to contribute to the cost of a drainage work constructed by and in a lower municipality must in the circumstances here be governed by those cases. I must dissent from this contention. There is, in my opinion, nothing in the language of the sub-section to



Judgment.

LISTER,  
J.A.

warrant such a view. A comparison of sub-sections 3 and 4 with section 590 makes it perfectly apparent, as it appears to me, that the Legislature in enacting these sub-sections had in view the cases of *In re Orford and Howard* and *In re Harwich and Raleigh*—(the case of *Broughton v. Grey* was then pending)—and intended to alter and extend section 590 so as to impose upon lands in a municipality from which water has by any means been caused to flow upon and injure lands in another municipality a liability to contribute to the cost of a drainage work such as the one in question here, without regard to whether such water has been caused to flow upon and injure such lands either immediately or by means of another drain or by means of a natural watercourse into which it has been conveyed and discharged for the purpose of being carried away. The language of the sub-section is clear and unambiguous. In plain terms it declares that if by *any means* water is caused to flow upon and injure the lands of another municipality, the lands from which such water is caused to flow may be assessed, etc. The sub-section obviously refers to waters artificially caused to flow and which would not otherwise find their way to the lower lands.

The words (upon which the judgments in *Broughton v. Grey* largely proceeded) in section 590 “then the lands that use or will use such drain when constructed as an outlet either immediately, or by means of another drain from which water is caused to flow upon and injure lands,” are omitted from both sub-sections. Then sub-sections 3 and 4 distinguish assessment liability for “outlet” from liability for injury occasioned to the lower lands from the waters of the upper lands being caused to flow upon and injure them. The former liability is founded upon the benefit which the upper lands will derive from the construction of an outlet or an improved outlet: see cases *supra*; and the latter liability arises not by reason of any benefit that the upper lands will derive but in respect of the injury sustained by the

lower lands resulting from the waters of the upper lands being caused to flow upon and injure the lower lands. This liability is, by sub-section 3, termed "injuring liability." Sub-section 4, which relates to "outlet," was obviously intended to overcome, and, in my opinion, does overcome, the decisions before cited, by providing that lands using a drainage work as an outlet either directly or by means of any other drainage work or of any swale, ravine, creek, or watercourse, may be assessed as for outlet. Manifestly sub-sections 3 and 4 are framed so as to enlarge the liability created by section 590 at least to the extent before indicated. To place any other construction upon sub-section 3 would, as it seems to me, defeat its plain object.

Judgment.  


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 LISTER,  
 J.A.

Upon the evidence I do not think that what occurred when the council of Howard referred the report back to the engineer can be regarded as an interference with his "independent judgment."

I do not think the other objections raised and argued are fatal to the report.

The appeal must be dismissed with costs.

OSLER, J. A. :—

I agree in the result, but I do not think it is necessary in this case to decide whether the law laid down in *Broughton v. Grey and Elma* (1897), 27 S. C. R. 495, has been changed by the recent legislation.

MACLENNAN, and MOSS, JJ. A., concurred.

*Appeal dismissed.*

R. S. C.

## BREWSTER V. HENDERSHOT.

*Trust—Church—Possession—Religious Institutions Act—R. S. O. ch. 307.*

Land was conveyed to certain persons in trust for a religious body called The United Brethren in Christ, and a congregation was organized and a church built. Subsequently a division took place in the religious body and it was held, in *Itter v. Howe* (1896), 23 A. R. 256, that the party to which the congregation in question adhered were seceders. This congregation continued to use the church, and, some of the original trustees having died, appointed new trustees to act with the survivors, and these trustees refused to give up possession to the representatives of what had been declared to be the true body:—

*Held*, that the trustees must be treated as being trustees for the true body, who were entitled to enforce the trust and to have possession of the church, and that it was not necessary to organize another congregation and appoint new trustees for that congregation under the Religious Institutions Act.

Judgment of ARMOUR, C. J., reversed.

**Statement.** APPEAL by the plaintiffs from the judgment at the trial. The following statement of the facts is taken from the judgment of MOSS, J. A.:—

This action arises out of the dispute, with which the courts of this Province, and of several of the States of the neighbouring Republic, are familiar, amongst the members of the religious society known as the United Brethren in Christ, which in 1889 culminated in the withdrawal of a small section from the main body.

Those remaining, representing the great majority of the members, have become known as the Liberals; those withdrawing were for some time known as the Radicals, but they have now assumed the title of Conservatives.

The differences between these two sections soon extended to questions relating to the title of property held for the use and benefit of the church, and resort was had to the courts.

Suits were instituted in the courts of several of the States of the Union, and in every instance except one the courts resolved that the Liberals represented the church, and were entitled to the church property. The most recent of these is *Brundage v. Deardorff* (1899), 92 Fed. Rep. 214.

In this Province the same questions came up and were decided in favour of the Liberals in *Itter v. Howe* (1896), 23 A. R. 256. Statement.

That action concerned a parcel of land in the town of Port Elgin in the county of Bruce, with a church building thereon. The plaintiffs, representing the Liberals, claimed to be entitled to recover possession from the defendants, who represented the Radicals.

The broad question was which of these sections represented the Church of the United Brethren in Christ, and it was determined that the Liberals were the church and society of the United Brethren in Christ as fully to all intents and purposes as before the division of 1889, and that the Radicals were, as a result of their own acts, "ecclesiastically distinct," and had no title to the property held by the society prior to their secession.

In the present case the dispute is over the right to a parcel of land in the village of Stevensville in the county of Welland, with a church building erected thereon.

The plaintiffs claim to be trustees by due appointment under the annual and quarterly conferences of the Liberals. The defendants represent the Radicals or Conservatives, as they now call themselves.

On the 1st of May, 1865, the lands in question were conveyed by indenture of grant to the defendants John Hendershot and David Shisler and one Wm. H. Abraham (therein described as trustees of the United Brethren in Christ), and their successors in office, in trust for the United Brethren in Christ forever; to have and to hold unto them and their successors in office in trust for the United Brethren in Christ.

Up to the time of the division in 1889, there could be and was no question as to the property and ownership of this parcel of land and church building.

But since that time the defendants Hendershot and Shisler (the third trustee being dead), being in sympathy with the Conservatives, have permitted the church edifice to be used by the members of the congregation adhering



**Statement.** to their views, and that section has dealt with the property as its own. They have assumed to appoint the defendants Plato, Climenhague, and Howe, additional trustees under the provisions of R. S. O. ch. 307, and they have refused to recognize any right in the Liberals to the property.

The plaintiffs claimed in their statement of claim to be awarded possession of the lands and premises, and to have it declared that they were the owners thereof in trust for the Church of the United Brethren in Christ, and further and other relief.

The defendants set up a lengthy defence, the substance being a denial of the plaintiffs' title, and an assertion of the right of the congregation which had been using the church to continue to do so, and a submission that the Attorney-General was a necessary party. They also set up an agreement between the original trustees and the congregation of the Church of England at Stevensville for the use of the church at certain times and that there is subsisting a debt of \$400 and interest in respect of the church building.

In reply the plaintiffs express their willingness to recognize and continue any agreement made with the congregation of the Church of England. They further say they bring the action on behalf of themselves and all other members of the Church of the United Brethren in Christ, and that there is no congregation of the church at Stevensville, in consequence whereof the provisions of R. S. O. ch. 307 could not be complied with. And they ask that they may if necessary be appointed by the Court to represent the church as trustees of the property.

Before the trial it was agreed between the solicitors, that the evidence and the documents and admissions (save two of the latter) put in and made in *Itter v. Howe*, should be admitted as evidence in this case. It was also admitted that shortly after May, 1889, a request was made on behalf of the Liberal section of the United Brethren Church at Stevensville, on the defendant Hendershot only, to be allowed to hold religious services in the church edifice, but the request

was not complied with, and that the defendants and those holding the same views with them have since exclusively used the said church; that there is now no congregation of the Liberal section of the United Brethren Church at Stevensville; that the plaintiffs were in October, 1898, appointed trustees of the church property in question by resolution of the yearly conference of the United Brethren Church for Canada, and also by resolution of the quarterly conference of the circuit to which Stevensville belongs and not by the congregation at Stevensville. It was also agreed that the book of discipline of the United Brethren Church should be admitted and put in as shewing the mode of appointing trustees for and dealing with church property. Statement.

Upon this and some other material the case was heard by ARMOUR, C. J., who reserved judgment, and afterwards decided in favour of the defendants and dismissed the action.

The appeal was argued before OSLER, MACLENNAN, MOSS, and LISTER, JJ. A., on the 4th of December, 1899.

*German*, Q. C., for the appellants. The defendants occupy exactly the same position as the defendants did in *Itter v. Howe*, and do not represent the organization of the United Brethren in Christ, but represent a new and seceding organization, and they cannot refuse to recognize, or hold the property in question in trust for, the United Brethren in Christ, in accordance with the trust declared in the conveyance of the property to the defendants. The learned Chief Justice appears to base his decision on the authority of *Craigdallie v. Aikman* (1813), 1 Dow 1, and *Attorney-General v. Pearson* (1817), 3 Mer. 353, but both these cases were cited without avail on behalf of the defendants in *Itter v. Howe*. As the defendants refuse to hold the property in question on the trusts declared or to carry out the purposes of the trust, the Court, even assuming that the plaintiffs are not the legal trustees, has power to, and should, remove the defendants and appoint the plaintiffs trustees of the property in question :

Argument. *Letterstedt v. Broers* (1884), 9 App. Cas. 371. The defendants' principal contention is that as the plaintiffs have not been appointed trustees under the Religious Institution Act, they are not the legal trustees and have no right to bring this action. But the plaintiffs have been appointed trustees of this property by resolutions of the yearly and quarterly conferences of the United Brethren in Christ and as such represent the *cestuis que trust* for whose benefit the trust was created and as such they are entitled to bring this action: *Davis v. Jenkins* (1814), 3 V. & B. 151; *Boulton v. Church Society* (1868), 15 Gr. 450; *Trustees of Franklin Church v. Maguire* (1876), 23 Gr. 102; *Wilberforce Educational Institute v. Holden* (1887), 17 O. R. 439.

*T. D. Cowper*, for the respondents. The plaintiffs have proceeded on what, it is submitted, is an erroneous conception of the judgment in *Itter v. Howe*. The defendants do not quarrel with that judgment, nor did they defend this action on the ground that that judgment was wrong, but they submit that this case is not governed by *Itter v. Howe*. In that case there was no dispute as to the appointment of the plaintiffs as trustees, while in this case the defendants do not admit the validity of the appointment of the plaintiffs as trustees, and this one fact makes the present case entirely different. This is in effect an action of ejectment and it is submitted that the old rule which always obtained in ejectment actions yet holds good in actions for the recovery of land, namely, that a plaintiff must succeed, if he succeeds at all, on the strength of his own title, and the plaintiffs have shewn no title to the land in question. The right of religious societies to hold land is a statutory right, and the statute now governing is R. S. O. ch. 307. It is not pretended on the part of the plaintiffs that they have been appointed under this Act, nor have the defendants been removed from office under this Act, and the defendants submit that until proceedings under this Act are taken they cannot be dispossessed.

*German*, in reply.

March 27th, 1900. OSLER, J. A. :—

Judgment.

OSLER,  
J.A.

On the merits of this case it is not distinguishable from the case of *Itter v. Howe* (1896), 23 A. R. 256, decided in this Court some years ago, and I do not think there is any difficulty in giving the plaintiffs substantial relief.

The defendants Hendershot and Shisler are the two surviving trustees of those named in the deed by which in 1865 the lands in question were conveyed to them and their deceased co-trustee and their successors in office in trust, not for any particular congregation, but for the purposes of the religious body called the United Brethren in Christ. The plaintiffs represent that ecclesiastical body, as decided in *Itter v. Howe*.

In 1896, persons not members of that body, though asserting that they were, assumed to appoint as co-trustees with the two surviving trustees, the defendants Plato, Climenhague, and Howe, the latter one of the defendants in *Itter v. Howe*, but this appointment not being made by any lawful authority fails to give any title to those defendants.

The legal title to the property in question is therefore in the defendants Hendershot and Shisler alone as surviving trustees.

And though they are themselves no longer members of the body in trust for whom the property was conveyed they are bound to hold and administer the property on behalf of and for the purposes of their *cestuis que trust*, and not for those who, though calling themselves by the name of the United Brethren in Christ, are not that body, whose ecclesiastical identity with the United Brethren in Christ as existing at the date of the conveyance was declared by our judgment in the case above cited, as well as by every one of the numerous courts in the United States in which the question has been raised except in a court in the State of Michigan. Instead of complying with this duty they are refusing to recognize the rights of their *cestuis que trust* and are assuming to hold and



Judgment.

OSLER,  
J.A.

administer the property in the interest of another organization of which they have themselves become members, an organization composed of those who, under the name of Radicals, withdrew from the true church, wrongly contending that they themselves were such true church.

If there were a congregation at present worshipping in the church building in question the defendants might be removed and new trustees appointed under the provisions of the Act, R. S. O. ch. 307. But there being at present no congregation by whom that can be done, the plaintiffs are entitled not merely to a declaration of their rights, but also to have the defendant trustees removed, and new trustees appointed by the Court, by the appropriate proceedings for that purpose.

Moss, J. A. :—

Upon the argument of the appeal the defendants' counsel did not attempt to question the decision in *Itter v. Howe*, nor its resulting effect upon the title to the property of the church. He conceded that the result of it was to establish the title of the Liberal section to all property held for the use or benefit of the United Brethren in Christ at the time of the division in 1889.

He did not seriously dispute that having regard to that case the property in question herein must be deemed to be the property of the Liberal section.

Indeed, upon the pleadings, admissions, and evidence, which, in respect of this branch of the case, are in all essentials identical with those in *Itter v. Howe*, a different conclusion could not be hoped for or expected.

He based the defendants' opposition to the plaintiffs' claim on the ground of want of status in the latter.

He insisted that the defendants are the duly appointed trustees of the property, that the legal estate is vested in them, and that the plaintiffs have shewn no title to the possession, or otherwise to the interposition of the Court in their behalf.

In the defendants' reasons against the appeal it is put that this is, in effect, an action of ejectment, and that the plaintiffs must succeed, if they succeed at all, upon the strength of their own title.

Judgment.

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Moss,  
J.A.

The conveyance of the property contains no provisions for the appointment or removal of trustees, and it is the common case of the plaintiffs and defendants that there is now no congregation of the United Brethren in Christ at Stevensville.

The congregation, therefore, which assumed to pass resolutions increasing the number of trustees, or to appoint the defendants Plato, Climenhague, and Howe, additional trustees of the property held under the conveyance, was not a congregation or society entitled to the benefit of the land, and their action was not sanctioned by R. S. O. ch. 307.

Consequently the three last named defendants have no title to the property, and the only duly constituted trustees are the defendants Hendershot and Shisler, the survivors of the three trustees to whom the lands were originally granted. They appear to have been members of the church at the time of the conveyance, and so were eligible to hold the office of trustees, but they were not appointed by the quarterly conference before the conveyance to them as provided by ch. XIII. of the Discipline. It is said, however, that after the conveyance there was a resolution of the quarterly conference confirming their appointment as trustees.

The Discipline provides that at least a majority of a board of trustees appointed by the quarterly conference shall be members of the church, but it makes no provision for removal of trustees upon their ceasing to be members of the church.

But the power of the Court to intervene where it is proper that trust property should be administered by trustees holding the opinions of those for whose benefit the trust was intended is beyond question: *Attorney-General v. Pearson* (1817), 3 Mer. 353; *Attorney-General v. Pear-*

Judgment. *son* (1835), 7 Sim. 290 (a subsequent case with reference to the same trusts); and *Attorney-General v. Shore* (1833), 7 Sim. 309 (n), (1843) 11 Sim. 592, and *sub nom. Shore v. Wilson* (1842), 9 Cl. & F. 355.

MOSS,  
J.A.

In *Attorney-General v. St. John's Hospital, Bath* (1876), 2 Ch. D., at p. 565, Malins, V.-C., said: "The principle established by Lord Eldon's judgment in *Attorney-General v. Pearson*, acted upon and finally confirmed and settled by the great case with regard to Lady Hewley's charities, is this, that where there is a charity for the purpose of education in particular religious opinions and particular religious tenets, or where there is a charity, and the objects of that charity must be persons holding particular religious opinions, or having particular religious tenets, it must be governed by trustees whose opinions are in conformity with those objects."

The defendants Hendershot and Shisler hold the legal estate in the property and are in law entitled to the possession thereof, but they are bound to hold upon the trusts expressed in the conveyance and no others.

They may not make use of the legal estate for purposes other than those declared in the instrument or divert the property from its lawful and proper uses. Nor may they set up or aid the adverse title of a third party, nor hand over the property to persons who are not their *cestuis que trust*: *Newsome v. Flowers* (1861), 30 Beav. 461.

The plaintiffs, suing on behalf of themselves and the other members of the Church of the United Brethren in Christ, claim the aid of the Court to prevent a diversion of the property in question from its lawful and proper uses. And if by reason of the legal estate outstanding in some of the defendants the remedy by action for possession is inapplicable or inadequate the Court, if convinced that the legal estate is being used contrary to the purposes for which it is vested, ought to control and compel the proper execution of the trust.

The plaintiffs and those in harmony with them have

been adjudged to be the church and as such entitled to the use and benefit of the property held for it. By the very terms of the conveyance the defendants Hendershot and Shisler hold the property in question for the use and benefit of the church, and therefore those not in sympathy with the plaintiffs' views have no right to hold or use it for their purposes.

An important distinction between this case and the case put by Lord Eldon in *Craigdallie v. Aikman* (1813), 1 Dow 1, is that the property in this case is to be held in trust not for the use and benefit of a particular congregation, but for the use and benefit of the United Brethren in Christ, and the defendants and those in sympathy with them have been adjudged to be not of that body.

The defendants Hendershot and Shisler have persisted in their opposition to the claims of those who alone are their *cestuis que trust*, and have thus rendered themselves subject to removal.

If the circumstances brought the case within R. S. O. ch. 307, it would be proper to leave the matter of removal or substitution to be dealt with under it, and to do no more in this action than to declare the right to the property and restrain the defendants from holding or using it otherwise than for the purposes of the members of the Church of the United Brethren in Christ, and from preventing or interfering with any members of the church in their use of it for the proper purposes of the church.

But there is at present no congregation, and in the circumstances the statutory provisions cannot be applied. Therefore the plaintiffs are entitled if they desire it to the more extended relief of removal of the present trustees and the appointment of proper ones in their stead, and the plaintiffs should be allowed to make all proper and necessary amendments to the record.

Upon the argument the plaintiffs undertook to assume payment of the debt upon or in respect of the church edifice.

Judgment.

Moss,  
J.A.



**Judgment.** The appeal should be allowed and judgment entered for the plaintiffs in the terms indicated, with costs here and below.

Moss,  
J.A.

MACLENNAN, and LISTER, JJ. A., concurred.

*Appeal allowed.*

R. S. C.

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UFFNER v. LEWIS.

BOYS' HOME v. LEWIS.

*Executors and Administrators—Trustees—Distribution of Estate—Unpaid Legatee—Contribution by Other Legatees—Limitation of Actions.*

Legatees entitled to a share of the residue of an estate are not bound by the accounts and proceedings in an administration action, instituted by other residuary legatees, in which they have not been added as parties, and of which they have received no notice. The judgment for administration in such an action, however, enures to their benefit, and makes a fresh starting point in their favour as against the defence of the Statute of Limitations.

In the absence of reasonable efforts by the executors of an estate to discover the whereabouts of certain persons entitled to share in the residue, other persons who have received a share of the residue must refund, for the benefit of the persons whose claims have been ignored, the amount received in excess of the sum payable if the division had been properly made.

Judgment of ARMOUR, C.J., affirmed.

**Statement.** THESE were appeals from two orders of ARMOUR, C. J., and were argued before BURTON, C. J. O., MACLENNAN, MOSS, and LISTER, JJ. A., on the 5th and 6th of October, 1898. The facts are stated in the judgments.

*Armour*, Q.C., and *W. Bell*, for the appellants, Lewis and Morgan.

*Teetzel*, Q.C., for the appellants, The Boys' Home.

*D'Arcy Tate*, for the respondents.

January 24th, 1899. The Court stated that the appeal would be dismissed, but that the judgment would be varied in some matters of detail. On the 7th of May, 1900, the following judgments were given.

MACLENNAN, J. A. :—

Judgment.

MACLENNAN,  
J. A.

This is an appeal by the defendants, the executors of Daniel Evans, deceased, in the first action, and by both the plaintiffs and defendants in the second action, from a judgment of Armour, C. J., dated the 26th of April, 1898, whereby the proceedings for the administration of the estate of the testator Daniel Evans, in *Boys' Home v. Lewis*, were directed to be opened up, and an account to be taken of the legacy bequeathed to the plaintiffs the Uffners, and payment to be made thereof in certain proportions by the Boys' Home, and the defendants Lewis and Morgan.

Daniel Evans died on the 4th of April, 1880, having made his will on the 29th of April, 1879, whereby he gave a legacy of \$500 to his sister Rachel, \$500 to his niece Mary, daughter of his late brother David, \$500 in even and equal shares to the children of Sarah Uffner, another daughter of his brother David, and \$500 to the plaintiffs the Boys' Home. He also gave a legacy of \$100 to his servant Margaret Sullivan, out of a special fund, which has been paid, and about which no question arises. The will then directed that if there should be a residue after paying his debts, and the legacies, and other charges, it was to be divided and paid to and among the legatees in the will named and referred to (except Margaret Sullivan), and his trustees or the survivor of them, in even and equal shares and proportions. In 1882 an action was commenced by the Boys' Home, against the executors alone, for the administration of the estate of the testator, and on the 22nd of November, 1882, a judgment was pronounced on a motion upon the pleadings, in the usual form for administration, with a reference to the Master at Hamilton. The Master made his report on the 5th of February, 1883, wherein he made the following findings: 1. The residue of the estate for distribution among the parties entitled under the will was \$16,531.71, of which the Boys' Home were entitled to one-third, Rachel Evans one-third, and the executors to the remaining third. 2. The executors

Judgment. had before action duly advertised for creditors, and had  
MACLENNAN, paid all the debts and funeral expenses. 3. That in respect  
J.A. of the legacies given by the will to the children of Sarah  
Uffner, and to Mary, daughter of the testator's brother  
David, the same were abortive and never could take effect,  
and that those legacies fell into the residue, and passed to  
the Boys' Home and the executors, under the residuary  
clause of the will. He stated that "the executors had  
made personal enquiry in the State of Ohio where those  
legatees were supposed to be found, and had advertised for  
them in a paper published in Welsh, in Utica, State of  
New York (all the said legatees being Welsh except the  
plaintiffs and Mary Sullivan), that no trace of the legatees  
or any of them could be found, and that the result of  
enquiry went to shew that Sarah Uffner had been dead  
for ten or twelve years, being then about sixty years of age,  
and was not known to have any children." The report  
further states that an office copy of the judgment and  
of the warrant to proceed, had been served upon Rachel  
Evans. The report was afterwards varied on appeal in  
some particulars of detail, not material to the present  
appeal, and on the 3rd of May, 1883, distribution was  
ordered, in accordance with the report, among the three  
parties thereby found entitled, and was made accordingly.

The advertisement published by the executors before  
action in a Welsh newspaper was, being translated, as  
follows :—

"Enquiry for Mary, daughter of David Evans, a native  
of Carmarthenshire, who was killed somewhere in the  
United States many years ago, through his horses becom-  
ing unmanageable. Also children of Sarah Auffred,  
another daughter of the said David Evans. Daniel Evans,  
merchant tailor, of Hamilton, Ontario, Canada, a brother  
of the said David Evans, died April 8th, 1880, and left  
in his will sums of money to the above persons, who should  
correspond without delay with John Lewis, Waterdown,  
Ontario, or R. E. Morgan, Hamilton."

It is admitted that no other advertisement was pub-

lished, either by the executors themselves, or by direction of the Master, with the object of notifying Mary, the daughter of the testator's brother David, or the children of Sarah Uffner, of the judgment, or of the proceedings therein, or of requiring them to give notice of their claims upon the estate of the testator, and the children of Sarah had no notice or knowledge of the testator's death until shortly before the commencement of their present action on the 9th of November, 1895. That action is by the plaintiffs, claiming to be the children of Sarah Uffner or Auffner named in the testator's will, and is brought against the executors and the Boys' Home alone. In their statement of claim, after setting forth the will of the testator, they state the proceedings in the former action, and the distribution of the estate therein, that they were all at that time infants, residing abroad, and were not made parties to or notified of the proceedings, and have never received the legacies to which they were entitled. The relief asked is payment of their legacies, and that for that purpose, if necessary, the administration proceedings should be opened, and that the plaintiffs should be added as parties thereto. Both the executors and the Boys' Home filed statements of defence. They both deny that the plaintiffs are the lawful children of Sarah Auffner or Uffner, named in the will, and set up and rely upon the proceedings in the former action as a protection, and as binding on the plaintiffs. They also set up the Statutes of Limitations as a bar.

Judgment.

MACLENNAN,  
J.A.

Issue was joined on the 16th of May, 1896, and a commission having issued to take evidence in the State of Ohio, many witnesses were there examined to establish the identity of the plaintiffs as the children of Sarah Uffner named in the testator's will; and the case came on for trial before Armour, C. J., on the 29th of April, 1897. At the conclusion of the trial the learned Chief Justice adjudged that the plaintiffs were the children of Sarah Auffner named in the will, and were entitled to the benefits of it, and directed that they should proceed by



Judgment.  
MACLENNAN,  
J.A.

petition for relief in the administration action, and that the petition should be brought on before him for adjudication, with liberty to all parties to apply. A petition was thereupon presented by the now respondents, entitled in both actions, which was answered by the executors; and it came on to be heard before the learned Chief Justice on the 26th of April, 1898. Thereupon the learned Chief Justice made the order, which, as well as the judgment of the 29th of April, 1897, is the subject of the present appeal. That order directed: 1. The opening up of the administration of the estate of the testator directed by the judgment of the 22nd of November, 1882, in *Boys' Home v. Lewis*, notwithstanding the orders and reports made in respect thereof. 2. Reference to the Master to inquire and state what amount the plaintiffs were entitled to recover under the will. 3. Payment by the Boys' Home of one-third, and by the executors of another one-third of the amount which might be found due. 4. Payment to the petitioners of the costs of the petition and of the order thereon by the executors and the Boys' Home. 5. Reservation of the costs of the reference until after report. 6. Payment of the costs of the action of *Uffner v. Lewis* by the executors and the Boys' Home. 7. That the order should be without prejudice to the rights of Mary Evans. The Boys' Home and the executors appeal from both orders. They object to the order made in the action because the plaintiffs should have proceeded by petition under Rule 782, now 642, of the Judicature Act, and not by action, and because the plaintiffs' claim was barred by the Statutes of Limitations, and particularly by the 13th section of the Trustee Act of 1891, and also that the evidence of the plaintiffs' identity is insufficient, and that they are precluded by laches. The objections to the order made on petition, are that inasmuch as the petitioners are strangers to the administration action, the learned Chief Justice had no jurisdiction to open up the proceedings, and that in any case the petitioners were barred by laches and the Statutes of Limitations; that the

estate having been in effect distributed by the Court, by Judgment. the judgment on further directions, the distribution cannot be opened up, and that the judgment of the Court is a complete protection to the executors; that the petitioners' only relief is by action for a refund from the legatees who have been paid, and that the order is faulty in leaving unaffected the rights of Mary Evans. The executors also say that the statutory advertisement appearing to have been issued in the proceedings is a bar to the claim of the petitioners.

MACLENNAN,  
J.A.

These are the grounds of appeal, and I will now consider how far, if at all, they are well founded.

The objection that the plaintiffs had not established their identity as the legatees mentioned in the will was not, and could not be, very strongly urged or relied upon in argument before us, for the evidence leaves no doubt at all on that point. It is proved that they are the children of Mary Uffner, the daughter of the testator's brother David, and when the Boys' Home commenced their action in 1882, one of the plaintiffs was twenty-two years of age, and the others were all infants, of the respective ages of nineteen, seventeen, thirteen and eleven years, and they all resided in the State of Ohio. According to the practice of the Court, before the general orders of 1853, founded upon the English statute of 15 & 16 Vict. ch. 86, all legatees were necessary parties to a general administration suit, subject to this qualification, that if a legatee was without the jurisdiction, the Court would proceed without him, against other parties, as far as circumstances would permit. But in such a case the person not made a party was in no way bound by the proceedings: Mitford on Pleading, 5th ed., p. 190 *et seq.*; Story on Pleading, 8th ed., secs. 87, 89 *et seq.*; Calvert on Parties, p. 171. Order VI., Rules 1, 2 and 3, of the Orders of 1853, introduced a new practice and provided that every residuary legatee, devisee or heir, might have a decree for the administration of the estate of a deceased person, without serving the remaining legatees, co-residuary legatees or

Judgment. co-heirs. But by Rule 6 it was provided that in all such cases, the persons who, according to the practice of the Court, would be necessary parties to the suit, were to be served with an office copy of the decree, and after such service they were to be bound by the proceedings in the same manner as if they had been originally parties to the suit: Taylor's Orders (1860), pp. 9, 10; Morgan's Orders (1858), pp. 162, 163. That practice has been continued down to the present time, and, when the present proceedings were commenced and carried on, was found in the Chancery Orders, 58, 59, 60, which were continued in force by Order XII, (14), and Rule 102 of the Judicature Act, 1881, and Consolidated Rules of 1888, secs. 320, 321, 322. Besides these rules of practice, an Act was passed in 1865, 29 Vict. ch. 28, sec. 27, which provided that where an executor or administrator should have given such or the like notices, as in the opinion of the Court in which such executor or administrator is sought to be charged, would have been given by the Court of Chancery, in an administration suit, for creditors and others to send in to the executors or administrators, their claims against the estate of the testator or intestate, such executor or administrator should at the expiration of the time named in the said notices, or the last of the said notices, for sending in such claims, be at liberty to distribute the assets of the testator or intestate, or any part thereof, amongst the parties entitled thereto, having regard to the claims of which such executor or administrator had then notice, and should not be liable for the assets or any part thereof so distributed, to any person of whose claim such executor or administrator should not have had notice at the time of such distribution of the said assets, or a part thereof, as the case might be; but nothing in the Act was to prejudice the right of any creditor or claimant to follow the assets, or any part thereof, into the hands of the person or persons who might have received the same respectively. That enactment was a copy of an Imperial enactment, 22 & 23 Vict. ch. 35, sec. 29, and was afterwards sec.

34, R. S. O. (1877) ch. 107. The notices which would have been given by the Court of Chancery in such cases were regulated by Orders 223 and 475, and the form of advertisement was prescribed by Schedule V to the Orders, which limited a time within which claims should be made. Now, in the present case, the notice in the Welsh language, published in the Utica newspaper, was clearly not such a notice as the practice required, or as the Court would have directed, and the notices published in the Hamilton newspapers were merely notices for creditors. It is, therefore, clear that the appellants cannot claim the protection of R. S. O. ch. 107, or of the Chancery Orders which have been referred to. There is another reason why they could not claim the protection of the Revised Statute ; it is only a protection against claims of which they had no notice. In the present case there was no want of notice ; the will giving a legacy to these children had been made less than a year before the testator's death, and the executor Lewis, in his evidence, admits in the clearest manner, that he never supposed the plaintiffs were dead, or that Sarah Uffner had no children. He says he supposed they were alive, and the sole difficulty was to find them. The case, therefore, is of the estate being distributed in the absence of the legatees, whose existence was known, without their being made parties to the action, and without the judgment having been served upon them with the notice as required by Chancery Order 60 ; and also without the service of any notice or the publication of any advertisement which would bind them by the proceedings. Now, the effect of all that is, that these plaintiffs are in no way bound by anything that took place after the judgment for administration. The statutes and the practice provide several means whereby they could have been bound ; but none of these means having been adopted, it is impossible to hold them bound. *May v. Newton* (1887), 34 Ch. D. 347, is a useful case, in which the corresponding English rules were discussed, and the same conclusion come to. It is difficult to imagine how these executors could have

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MACLENNAN,  
J.A. allowed this estate to be distributed upon the theory that the plaintiffs' legacies were *abortive*, as expressed by the Master, merely because, after the enquiries which they had made, the legatees could not be found. Lewis, in his evidence, says the executors opposed the distribution, for they did not know when the plaintiffs might turn up. If so, they should have objected to the Master's finding that the legacy was abortive, and should have called the attention of the Court to the facts. If they had done so, the Court would never have ordered distribution, without retaining the plaintiffs' share in Court.

All that has been said about the plaintiffs and their legacy, is equally applicable to the legatee Mary, daughter of the testator's brother David, except that while the report says that the evidence went to shew that Sarah Auffner had been dead ten or twelve years, and was not known to have any children, all that is said of Mary, the daughter of David, is that after enquiry no trace of her could be found. Mary and her share are, therefore, in exactly the same position as the plaintiffs and their shares. The executors had notice of her claim, and, in the absence of the prescribed proceedings, nothing short of proof of her death before the testator warranted the finding of the Master; and his report that her legacy was abortive and never could take effect was erroneous on its face. She was alive, and a married woman, in 1873, according to the evidence now given. If she survived the testator she became entitled to her legacy, and if she has died since her personal representative is entitled to it.

The question now is whether, and if so, to what extent the plaintiffs, and the legatee Mary, are bound by the administration proceedings. They are unquestionably bound by the judgment, but, I think clearly no farther. As we have seen, it was quite competent to the Boys' Home, according to the practice of the Court, to commence an action, and to proceed to a judgment for administration as they did, without making the other legatees parties, and without serving or notifying them,

or any of them. The moment the judgment was obtained, it was a judgment for the benefit of all parties interested. They were bound by it, and in the absence of an admission of assets by the executors, any separate action which the other legatees might commence would, under the old practice, have been restrained by injunction; and, under the Judicature Act, would have been stayed by the Court, upon an application made for that purpose: Story's Equity Jurisprudence, sec. 549, and cases there cited; 2 Williams on Executors, 9th ed., pp. 1908-10. There can be no question, therefore, that the judgment was one for the benefit of all the legatees. The order is that "all necessary enquiries be made, accounts taken, and proceedings had, for the administration and final winding-up of the personal and real estate of the said Daniel Evans, deceased, and for the adjustment of the rights of all parties interested therein." That being so, these legatees had a right to come in and claim the benefit of the judgment, and nothing has ever been done, as it might have been, to bar that right, or to limit the time within which they could exercise it. They are, therefore, not barred by anything done in the course of the proceedings, and the only question is whether they are barred by the Statutes of Limitations. The general statute relating to legacies is relied on, and also the Trustee Act of 1891. If the general statute were applicable the two eldest plaintiffs would be barred, for more than ten years had elapsed after they had become of age, both before the commencement of their action, and before the presenting of their petition; but the other three plaintiffs would not be barred, for they were infants until within ten years next before both proceedings. I think it is clear, however, that the administration judgment stopped the running of the statute, because it was a judgment for the benefit of all parties: 2 Williams on Executors, 9th ed., p. 1930; *In re Greaves* (1881), 18 Ch. D. 551; *Finch v. Finch* (1876), 45 L. J. Ch. 816. So far, therefore, as the general Statute of Limitations is concerned it is

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Judgment. no defence to the petition as against any of the plaintiffs ;  
 MACLENNAN, nor, indeed, is it any defence to the action as against any  
 J.A. but the plaintiff Frank, for the plaintiff Mary is proved to  
 have been of unsound mind from infancy, and the remain-  
 ing three to have been infants until within the statutory  
 period as already mentioned, and therefore incapable of  
 giving a discharge or release for their legacies : R. S. O.  
 (1887) ch. 111, sec. 23.

Then, as to sec. 13 of the Trustee Act, 1891, I think that also is clearly inapplicable. This action is not brought to recover the plaintiffs' legacy, but is an action to obtain the benefit of the judgment obtained by the Boys' Home. If there had been no such judgment, and if the executors had without fraud paid all the moneys of the estate away to creditors, or legatees, or even to supposed creditors or legatees, or had even lost it by improvident investment, it may be that the Act would apply, and that there could be no recovery but within six years: *In re Page, Jones v. Morgan*, [1893] 1 Ch. 304; *In re Gurney, Mason v. Mercer*, *ib.* 590; *Thorne v. Heard*, [1893] 3 Ch. 530; [1894] 1 Ch. 599; [1895] A. C. 495; *How v. Earl Winterton*, [1896] 2 Ch. 626, at pp. 638-41; *In re Davies, Ellis v. Roberts*, [1898] 2 Ch. 142. Besides being such a case as is mentioned in sub-section 2 of section 13, namely, the case of a beneficiary seeking the benefit of a judgment obtained by another beneficiary, the present is within the exception in sub-section 1, being an action or proceeding to recover trust property, or the proceeds thereof, still retained by the trustees. The trustees admit that there is a sum of over \$5,000 which they have never paid over to any one, and which must either have been in their hands within six years, or must have been converted to their own use. As to that sum, therefore, if there had never been any judgment, the plaintiffs could have maintained this action, and could have recovered a part, if not the whole, of their original share from the defendants, notwithstanding the provisions of section 13 of the Act.

Then what is the effect of the judgment for administra-

tion upon this new action? By sec. 16, sub-sec. 6, of the Judgment.  
 Judicature Act, as has already been mentioned, the old MACLENNAN,  
 practice of restraining such an action by injunction in the J.A.  
 administration suit was abolished, and it is provided that  
 the matter of equity may be relied on by way of defence,  
 provided the Court may in such a case stay the proceedings  
 upon application in a summary way. In this case, there-  
 fore, the defendants might, as soon as the action was  
 commenced, have moved summarily to stay proceedings,  
 on the ground of the administration judgment which had  
 already been obtained; but they did not do so. They set  
 the judgment up as a defence, and they went farther, they  
 denied that the plaintiffs were the legatees named in the  
 will, and they also set up that they were bound not only  
 by the judgment, but also by all the subsequent proceed-  
 ings, and that they had no rights whatever. The defen-  
 dants allowed the action to go on, and great expense to  
 be incurred in proving that the plaintiffs were the  
 legatees named in the will, and they allowed the case  
 to go to a hearing. If the defendants had applied  
 summarily immediately after the commencement of the  
 action for a stay of proceedings, the Court would doubt-  
 less have granted it, and would have directed the plaintiffs  
 to proceed by petition, just as the learned Chief Justice did  
 at the hearing; and the section of the Judicature Act, to  
 which I have just referred, provides that the judge might  
 have stayed the action, either generally, or so far as might  
 be necessary for the purposes of justice, and might have  
 made such order as might be just. I think that is what  
 the learned Chief Justice did at the hearing, and I think  
 he had the same power to do it at the hearing as at any  
 earlier stage of the action. I am, therefore, of opinion that  
 the order made by the learned Chief Justice at the trial of  
 the action is right, and that the appeal against that order  
 ought to be dismissed.

It remains to consider the appeal from the order made  
 upon the petition. I have already stated why I think the  
 plaintiffs are not bound by any of the proceedings in that



**Judgment.** action subsequent to the judgment, namely, because none  
**MACLENNAN,** of the steps were taken which the law provides for binding  
**J.A.** persons in the position of the plaintiffs by those proceedings. If the plaintiffs are not bound by them, then they are in the same position as if those proceedings had never been taken at all, and as if the whole proceeds of the estate, or at all events a sufficient portion thereof to answer the plaintiffs' claims, were still in the hands of the executors and undistributed. The executors cannot excuse themselves from liability for those claims on the ground that they paid the Boys' Home and Rachel more than their proper shares, under the judgment, or order on further directions, because the plaintiffs are not bound by that order, or by the payment made thereunder. They are in the same position as between them and the plaintiffs as if they had made those payments without any order at all.

The judgment of the learned Chief Justice directs the proceedings in the Master's office to be opened up, and that the Master is to enquire and state what amount the plaintiffs are entitled to under the will, of which the Boys' Home are ordered to pay one-third, and the executors another third. The judgment also saves the rights of the legatee Mary Evans under the will. The effect of that judgment is that the plaintiffs are only entitled to recover two-thirds of their share, and that in ascertaining the amount of their share it is not to be assumed that Mary Evans' legacy lapsed by her death before the testator, or became abortive as expressed in the Master's report. The question whether upon the will these plaintiffs are entitled to a share of the residue as a class or as individuals, that is, whether each of them is entitled to one-ninth, or whether they are only entitled to one-fifth between them, appears to have been discussed before the learned Chief Justice, but not decided. I have no note that the point was raised in the argument before us. The petitioners' counsel, both in his reasons against the appeal, and on his argument before us, said that they did not seek to make the executors liable for

the amount by which the legatees or beneficiaries other than the executors were overpaid, and only sought from them and the Boys' Home respectively the plaintiffs' share of such overpayments, although the claim is not so limited by the petition; and counsel for the Boys' Home disputed their liability to refund anything whatever. It is well settled that where a legatee has been paid in full, and the estate was originally sufficient to pay all, the one so paid in full cannot be required to refund, in case by the wasting of the executor there is not enough to satisfy the others; but that where the assets were originally deficient, then one who has been paid in full must refund, in order to produce proportionate payment; and that is the rule whether payment has been obtained with or without suit: 2 Williams on Executors, 9th ed., p. 1314, and cases cited. The principle there involved is the right of all to proportionate payment. Having regard to the original state of the assets, I think it follows that where a legatee has been paid more than his due share of a residue, he must refund the excess in favour of other legatees who have not received their shares, and who are not bound by the proceedings under which payment has been obtained. It is the same principle which was acted upon in *Bank of British North America v. Mallory* (1870), 17 Gr. 102. The right of legatees to proportionate payment is just as clear as the right of creditors under the statute upon which that case was decided. I therefore think that the Boys' Home is liable in the present case to refund what they have received to the extent of what they have received beyond their proportionate share. They were the plaintiffs in the action, and they are just as responsible as the executors for the defect in the proceedings whereby the estate was distributed behind the back of the petitioners. The same principle applies to the executors and to the excess retained by them beyond their proper share.

But I think the executors are not only liable for the excess but also for the full amount of the plaintiffs' share. As between them and the petitioners they are still

Judgment.

MACLENNAN,  
J.A.

Judgment. answerable as if the petitioners' share were still in their  
MACLENNAN, hands, never having paid it into Court as the original  
J.A. judgment required to be done. Cases have been cited  
where a creditor or legatee, coming in after the estate has  
been partially distributed, has been restricted to a share  
of the undistributed assets, or left to his remedy for con-  
tribution from those who had been paid, such as *Gillespie*  
*v. Alexander* (1826), 3 Russ., at pp. 136, 137; *Jervis v.*  
*Wolferstan* (1874), L. R. 18 Eq. 18. But these were  
cases where the legatee or creditor had neglected to come  
in in due time, although called upon to do so according to  
the practice of the Court, or by the notice authorized by  
the statute.

I am, therefore, of opinion that the appeals fail, but  
that the judgment should be varied, and that the Boys'  
Home should be ordered to pay into Court the excess  
received by them beyond their due share, and that the  
executors should also pay into Court the full amount, not  
only of the plaintiffs' share, but also of the share to which  
the legatee Mary would be entitled in case she survived the  
testator, but if the Boys' Home comply with the order  
then to the extent to which they do so the executors are  
to be relieved. The share of Mary is to be paid in, because  
if it turns out that she had died in the testator's lifetime  
the plaintiffs are entitled to a proportion of the legacy  
given to her. It will be the duty of the Master to take  
proper steps to ascertain whether that legacy lapsed or not.

I think the judgment deals hardly with the executors in  
respect of the costs. They are not free from blame for  
proceeding under the administration judgment without  
taking the steps provided by law for notifying the peti-  
tioners, but if they had proceeded regularly the petitioners  
would still have had to come in and prove their claims,  
just as they have done now, and we cannot say that a  
commission to examine witnesses in Ohio would not  
have been as necessary in that case as in the present  
circumstances. In that case the executors would have  
been entitled to their costs, and I think they are still

entitled to have them out of the estate, with certain Judgment. exceptions. When the plaintiffs learned of their rights MACLENNAN, they should have applied to the executors and the J.A. Boys' Home for consent to open up the administration proceedings, and the executors might reasonably have required that to be done upon petition and upon proof of their identity. The action brought by the plaintiffs was unnecessary, for it was not like *Aboulhoff v. Oppenheimer* (1882), 10 Q. B. D. 295, a case of a judgment obtained by false evidence, but a case of erroneous proceedings under a regular and valid judgment. On the other hand, the defendants might have applied for a stay of proceedings, and have required the plaintiffs to proceed by petition, which they did not do, but allowed the case to go to a trial. Under these circumstances, I think the plaintiffs in the action should have no costs of the action, except of so much of the proceedings therein as would have been useful and necessary if a petition had been presented in the first instance, and the executors should have no more costs of the action than would have been incurred in promptly applying for and obtaining an order to stay proceedings on the ground that a judgment for administration had already been obtained, and was available for the plaintiffs if they had any rights, such costs to be paid out of the estate. The costs of the petitioners, and of the executors, of the petition, including therein such costs of the action as would have been necessary or proper under the petition if there had been no action, should also be allowed out of the estate. The Boys' Home should neither pay nor receive any costs, either of the action or petition up to the hearing. The judgment should therefore be affirmed with these variations, and the respondents should have their costs of the appeal against both the executors and the Boys' Home.

I have anxiously and repeatedly considered this case, in consequence of the different opinion of the other members of the Court, and I am unable to take any different view



Judgment. of what the judgment ought to be than is expressed in  
MACLENNAN, what I have above written.  
J.A.

The Boys' Home have received their \$500 legacy, and the third of \$16,531=\$5,510; whereas they should only have received \$500 + one-fifth of \$16,531, or \$500 + \$3,310. They ought, therefore, to refund \$2,200.

Rachel Evans has received her legacy of \$500 and also one-third instead of one-fifth, and she has been overpaid \$2,200 also. That is an overpayment for which the plaintiffs are not responsible, but for which the executors are; and as against the plaintiffs they cannot say that it was a proper payment.

The executors had the whole fund in their hands, and the plaintiffs not being bound by the overpayments made to the Boys' Home and to Rachel Evans, they are as between them and the plaintiffs as if they had the three sums \$5,500, \$2,200 and \$2,200 still in their hands=\$9,900; they have in fact, \$5,500 still in their hands. Having made the overpayments improperly, it is they, and not the plaintiffs, who ought to bear the loss which may result.

The plaintiffs' share is \$500 legacy and \$3,300 residue, on the supposition that they take as a class and not as individuals.

Mary's share also \$500 + \$3,300.

These two amount to \$7,600, for which they have a right to resort to the \$2,200 overpaid to the Boys' Home and the \$5,500 still in the hands of the executors, the two sums together=\$7,700. If Mary Evans died before the testator her legacies lapsed. If she survived and is still alive she is entitled to \$3,800 as above; if she is dead her personal representative is entitled. If Mary's legacies lapsed, the estate is divisible into fourths instead of fifths, and the account would have to be readjusted accordingly.

If these are, as I think they are, the plain rights of the parties, I think that they ought not to be bound by a concession made by their counsel in argument. He ought

not, and I think could not, give away their plain rights, and much less ought the Court to be a party to his doing so. If the defendants think they have been prejudiced in the argument by the concession in the reasons, or in open Court, there should be a re-argument.

Judgment.  
MACLENNAN,  
J.A.

I think also that the plaintiffs ought not to be bound by the accounts which have been taken except *prima facie*; they should have a right to surcharge and falsify. This all the more because the Master appears to have made the division as if the executors themselves had a legacy of \$500, besides a share of the residue.

I observe also that one of the plaintiffs is a person of unsound mind, whose rights ought to be specially guarded and protected by the Court; which I think greatly strengthens the objection to holding the plaintiffs bound by a concession made on the argument by their counsel.

Moss, J. A. :—

I am of opinion that the appeals fail and ought to be dismissed.

While it must be conceded that the judgment for administration in *Boys' Home v. Lewis* was properly obtained, and that the Uffners are bound by it, though not parties to the proceedings prior to that, I think it is also true that under the circumstances now appearing they were not bound by the accounts taken or the distribution ordered to the extent contended for by the appellants.

They were not made parties, nor duly notified of the proceedings in the Master's office. The judgment therefore stands, but it stands for their benefit as well as for the benefit of those who were parties to it and to the proceedings in the Master's office.

I do not think anything that has transpired has had the effect of precluding them from claiming the benefit of the judgment, and obtaining the relief which the learned Chief Justice has awarded, in so far as payment on account of their shares is concerned.

Judgment.

Moss,  
J.A.

The respondents do not complain of the manner of taking the accounts of the estate, and they expressed their willingness and desire to accept the results of the accounts as taken by the Master and shewn by his report. There is no occasion, therefore, for the retaking of these accounts and the sum of \$16,531.71 found and stated by the Master to be the residue for distribution may stand as the residue forming the basis upon which the reference to be directed is to proceed.

And I think that for the ascertaining of the interests of the parties, the judgment of the learned Chief Justice ought to be varied by striking out the 2nd, 3rd, 4th, 5th and 6th paragraphs, and substituting the following :

[The learned Judge gave an outline of the terms of the order and continued :]

This order ought, I think, to cover the matters intended to be dealt with upon the reference back, but if any difficulty presents itself the parties may discuss the matter upon settling the minutes.

The appellants should bear the costs of the appeals.

I am of opinion that upon the present appeal we should not go the length of requiring the defendants Lewis and Morgan to repay the amount paid to Rachel Evans as her share of the residue or any part of it, first, because the petitioners have not made her a party to their action, nor served her with the petition upon which they now obtain the relief awarded them ; second, because they have not appealed from the judgment of the Chief Justice which but for the appeal of the Boys' Home and Lewis and Morgan would not be before us at all ; third, because not only have the petitioners not appealed but they have set forth in their reasons against the appeal that they are content to accept from the Boys' Home and Lewis and Morgan their proportion of the share to which the petitioners are entitled and do not seek to make the defendants Lewis and Morgan liable for the amount overpaid to other beneficiaries ; fourth, because in the course of the argument in this Court the petitioners' counsel repeated the

statement made in the reasons against appeal and the question of Lewis and Morgan's liability in respect of the overpayments was not argued before this Court; and lastly, because the payment to Rachel Evans was made under the authority of the judgment on further directions in the case of *Boys' Home v. Lewis*. The good faith of the executors Lewis and Morgan in making that payment has not been questioned, and I am not satisfied at present that they are not under these circumstances entitled to the benefit of the Act 54 Vict. ch. 19, sec. 13, now R. S. O. ch. 129, sec. 32.

Judgment.

Moss,  
J.A.

Before deciding that point against the executors I should desire to have the question discussed in argument by counsel.

But in view of all the circumstances I think the petitioners should be left to rest content with what has been awarded them as against the appellants.

BURTON, C. J. O., and LISTER, J. A., concurred with MOSS, J. A.

*Appeals dismissed.\**

R. S. C.

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\* Upon motion the terms of the order were settled by the Court.—REF.



## MCINTOSH V. PORT HURON PETRIFIED BRICK COMPANY.

*Conversion—Tenant in Common—Removal of Chattel to Foreign Country.*

An action for conversion of his interest in a chattel lies by one tenant in common against his co-tenants in common if the chattel owned in common is destroyed by them, or so dealt with by them as, in effect, to put an end to his rights.

In this case the removal of a brick making machine to a foreign country was held sufficient to support the right of action, the plaintiff's power of enforcing his rights in the Courts of this Province being thus interfered with.

Judgment of a Divisional Court reversed.

**Statement.** APPEAL by the plaintiff from the judgment of a Divisional Court [ARMOUR, C. J., and STREET, J.], reversing the judgment of ROSE, J., at the trial in his favour.

The plaintiff sued the defendants for the wrongful conversion of his property, described as a patent brick machine. The defendants by their statement of defence denied all the allegations in the statement of claim, and the defendant company further alleged that they bought the machine from persons named Pearce and Norris, who were the owners thereof, and in ignorance that the plaintiff had any title to or interest therein, and that if the plaintiff had any title he was estopped from asserting it. The defendant Smith further alleged that anything done by him in connection with the taking and removal of the machine had been done as the servant of the defendant company, believing it to be their property, and in ignorance that the plaintiff claimed any interest therein. The facts are stated in detail in the judgments.

The appeal was argued before BOYD, C., OSLER, MACLENNAN, and MOSS, JJ. A., and FERGUSON, J., on the 23rd of January, 1900.

*S. H. Blake*, Q.C., and *D. S. McMillan*, for the appellant.  
*Aylesworth*, Q.C., and *J. H. Moss*, for the respondents.

March 27th, 1900. BOYD, C. :—

Judgment.

BOYD, C.

The machine in question was made upon the order of the partnership, Pearce, Norris and McIntosh, but upon the sole credit of McIntosh. The evidence is very plain that this was the sole partnership asset (apart from the patent right held by the three), and that Pearce and Norris were persons of no substance, according to the knowledge of all parties.

The patent right was pledged in security for loans made by McIntosh, and it became his property on the 21st of August, 1897, by the failure of the others to pay. The quit claim deeds afterwards obtained in January, 1898, retroact to this and shew that the interest of the other two in the partnership was actually and practically nil. This confirms the statement made by the plaintiff (not contradicted) that no one had a dollar in the machine except himself.

The plaintiff regarded the partnership as ended on the failure of the other partners to redeem the patent, *i. e.*, on the 21st of August, 1897. No more business was done and the plaintiff took steps to secure the payment of the machine to the maker by a mortgage on his land in December, 1897. Though it may be technically there was still joint ownership of the machine, the only substantial interest therein was vested in the plaintiff at the time of the wrongful acts in question.

This machine, received by the plaintiff in June, 1896, was about to be shipped by him to Chatham for the purposes of a brick company being formed there, whereupon the president of the defendant company, Judge Thomas, said before it went away they would like to see it work and if it worked satisfactorily they would want one like it. Pearce, one of the plaintiff's nominal partners, said he would have to get the plaintiff's consent before it could go away. The plaintiff at first objected, but at last consented that it should go to Point Edward for the sole purpose of its being tested by the defendant company.

Judgment.

BOYD, C.

The defendant company then knew through their chief officer that the plaintiff had a substantial interest in the machine and that he consented to its going out of his possession for a limited purpose only.

In contravention of this and without notice to the plaintiff, but secretly, and, I think, fraudulently, the machine was, about the middle of August as to the main part, taken across the river to Fort Gratiot upon the instructions of the board of the defendant company and with the active intervention of the defendant Smith, then the treasurer and managing director of the company. Those present at the meeting of the defendant company, were Judge Thomas, the president; Norris, a director and quondam partner of the plaintiff; Smith, the defendant; and the secretary, whose name is not given (four out of the five directors).

It was afterwards agreed by the board (some thirty or sixty days after) that the machine should be accepted by the company in satisfaction of an old agreement, made, by another partnership composed of Pearce, Norris and Fitzgibbon, in 1895, to supply the defendant company with a brick machine. Those at this meeting were the same four as directed the deportation of the machine.

Now, as to the defendant Smith it is proved by McMillan that he admitted in conversation soon after the machine was taken across that he had arranged with Norris to get the machine into the United States, that he knew the machine was McIntosh's or that McIntosh had to pay for it, and though it was dishonest, yet one had to care for himself in the brick business. The defendant Smith denies this, but he states the substance of a conversation with McMillan agreeing in many details with what McMillan says, and I think credit should be given to the latter, not only because he made a memorandum of what was said next day, but because of Smith's facility to make solemn declarations contrary to the fact when it served his purpose to do so. For instance, on the 18th of August, in order to get the

machine legally into the States, or to hold it there, he makes a solemn declaration on the 18th of August, that the machine had been actually purchased by him as owner for the sum of \$100. This also as against him is good evidence of conversion, knowing what he did and acting as he did.

Judgment.

BOYD, C.

The whole transaction is a transparent juggle, whereby the plaintiff has been deprived of the possession and benefit of the machine. The evidence shews that the defendants knew of the limited purpose for which the machine was taken to Fort Edward, and violating this, in fraud of the plaintiff's rights, they take the thing into a foreign country and there dispose of it in a manner totally repugnant to the rights of the plaintiff. The defendants knew that the two impecunious partners, Norris and Pearce, had no right to order or sanction the taking of the machine to the United States and still less had authority to hand it over to the defendant company in satisfaction of the old engagement of another partnership. There was no *bonâ fide* sale or purchase of the machine, but there is sufficient evidence of a conversion wrought as against the plaintiff. The most valuable part of the machine passed into the hands of the defendants with full notice of the plaintiff's rights and without value being given to any of the joint owners, so that the defendants stand in no better position than the first wrongdoers, Pearce and Norris. The parts of the chattel which were left abandoned at Point Edward have been lost or destroyed.

It seems to me reasonably clear that the plaintiff has the right to charge the defendant with the value of his interest in the machine so tortiously dealt with; taking it at the lowest there was an equal partnership between the three, the measure of his recovery ought to be one-third of \$400, the value fixed by the trial Judge. But I am disposed to agree with that Judge in holding that the whole beneficial interest was in the plaintiff, and that his recovery should be for the full amount, \$400 with costs.



Judgment.

BOYD, C.

The precise point in this case as to the effect of a wrongful removal of the chattel and the disposal of it in a foreign country has not been decided in England. But there are many opinions favouring that conclusion. Thus in *Jacobs v. Seward* (1872), L. R. 5 H. L. at p. 475, general observations are made by Lord Hatherley to this effect: "Where the act done by the tenant in common is right in itself, and nothing is done which destroys the benefit of the other co-tenant in common in the property, there no action will lie, because he can follow that property as long as it is in existence and not destroyed. \* \* As long as the tenant in common is confining his use of that property to its legitimate purpose trover will not lie against him."

It appears to me that the act of taking apart the machine and carrying over the main part of it to the State of Michigan was under all the circumstances an illegitimate act. The mere removal of a ship to foreign ports is consistent with the rightful user of the ship which is always encouraged by the Court, but that method of reasoning does not apply to the case of a machine not designed in its ordinary use to be moved from one jurisdiction to another. The destruction spoken of in the cases is not an actual destruction but something practically equivalent to it: Parke, B., in *Morgan v. Marquis* (1853), 9 Exch. at p. 148.

In our own Courts *McNabb v. Howland* (1862), 11 C. P. 434, is much in point. The Chief Justice told the jury that the sale of the vessel without the consent of one joint owner in a foreign country was equivalent to the destruction of the article. In that case one joint owner had himself registered as sole owner of the boat at Montreal in 1858, and in 1860 sold her to one Barber in New York. This registration was not conclusive of the title and was not equivalent to a sale in market overt: *Holderness v. Lamport* (1861), 29 Beav. 129, and see *Hooper v. Gumm* (1867), L. R. 2 Ch. at p. 290. The Court, per Draper, C. J., says (p. 436): "*Mayhew v. Herrick* (1849), 7 C. B. 229, Maule, J., puts the case of a tenant in common exceeding his authority by selling out and out to a

purchaser who carries the chattel away, as a case which the other joint owner might treat as a conversion. And the sale in New York followed by the certificate of ownership [? preceded by] might be left to the jury as evidence (of conversion)."

Judgment.

BOYD, C.

Dicta to the like effect are found by Parker, J., and Ritchie, J., in *McKay v. Crocker* (1861), 5 Allen (N. B.) at pp. 23 and 24. See also *Rothwell v. Rothwell* (1866), 26 U. C. R. at p. 183, and *Brady v. Arnold* (1868), 19 C. P. at p. 46. The American law generally is more comprehensive as to what is conversion than that of England as lately expounded, but in Vermont and North Carolina the strict English view is maintained. Yet in both these States it is considered that the removal of the chattel out of the State tortiously is a conversion: *Grim v. Wicker* (1879), 80 N. Car. 343; *Bates v. Marsh* (1860), 33 Vt. 122. The law is concisely summed up in Bigelow on Torts, 6th ed., p. 248. It is not necessary, by any of the authorities, that there should be a physical destruction of the property as by breaking it in pieces; it is enough that the common interest, or rather the plaintiff's interest, is practically destroyed, as it is by a sale by the co-tenant and the buyer taking the property into another State there to be kept.

I would also note *Agnew v. Johnston* (1851), 17 Pa. St. 373; *Strickland v. Parker* (1866), 54 Me. 263; *Benedict v. Howard* (1860), 31 Barb. 569; *Needham v. Hill* (1879), 127 Mass. 133; and *Van Doren v. Balty* (1877), 11 Hun 239.

If one joint tenant bring trover against a stranger the latter must plead the joint tenancy in abatement, and if he neglect to do so he cannot give it in evidence, but the plaintiff is only entitled to recover the value of his share: 2 Saund. Pl. & Evid. 1164.

OSLER, J. A.:—

The learned trial Judge held that the machine had become the sole property of the plaintiff, and afterwards

Judgment.

OSLER,  
J.A.

gave judgment for the plaintiff generally against all the defendants on the ground, as may be inferred from the discussion which took place at the trial, that all the defendants were parties to the wrongful conversion complained of. This judgment was reversed, and the action dismissed, by the Divisional Court. No reasons for their judgment are reported.

The questions for decision are :—

1. Whether the plaintiff was the sole owner of the property.

2. If not, and if he was, at the time of the alleged conversion, the joint owner thereof with Pearce and Norris, then whether the facts proved amount to a conversion thereof by the defendants, or either of them, so as to enable the plaintiff to maintain the action for the recovery of his share or interest therein.

The facts, so far as they can be gathered from the evidence, which in some respects is confused and indistinct, seem to be the following :—

Pearce and Norris, who were the joint owners of a patent for the manufacture of brick, entered into partnership with the plaintiff about the 1st of October, 1895, "for the sale of territory in connection with the patent, and for carrying on the business of the manufacture of brick in connection with the same." The firm name was Pearce, Norris, and McIntosh. By the articles they assigned to the plaintiff a one-eighth interest in the patent for \$1,650. He was to be treasurer and financier of the firm at a salary of \$1,200 per annum, and was to apply himself to the sale of territory and anything else that he might plan for the advancement and promotion of the business.

In June, 1896, the firm ordered from a manufacturer at Seaforth a brick machine, the chattel in question, for the purpose of being worked in connection with their patent and promoting sales of territory, which was delivered at Sarnia soon after the 19th of June, 1896. From thence it was about to be sent to Chatham for the purposes of a brickmaking company about to be formed there, when one

Thomas, the president of the defendant company, went with Pearce to look at it while lying at the Sarnia Grand Trunk railway freight sheds, and proposed that before it was sent away, it should be sent to the company's works at Point Edward, that they might test it there, and get one like it if it worked satisfactorily. Pearce told him he would have to get the plaintiff's consent, which, after some hesitation, he gave, and the machine was accordingly taken into the company's works at Point Edward for the special purpose mentioned. The exact date of this is not mentioned, but it may be inferred from the evidence that it was about July, 1896.

Judgment.

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OSLER,  
J.A.

Meanwhile, the plaintiff in the exercise of his privilege of financing the partnership, had made large advances to the partnership, and had also lent money to his co-partners for their own benefit, and being about to advance \$1,000 more, his partners, on the 21st of August, 1896, granted and assigned to him all their rights in the patent for the purpose of securing these advances, which were to be repaid with interest at 7 per cent. before the 21st of August, 1897.

This machine and another of the same kind appear to have been the only assets of the partnership.

In January, 1898, Pearce, one of the patentees and mortgagors, by deed granted and assigned all his interest in the patent to the plaintiff. I am unable to find in the evidence any reference to a similar quit claim by Norris, the other mortgagor.

The plaintiff was asked: "And I think you got a quit claim afterwards? Yes. From Pearce and Norris? Yes." Only one such instrument was put in, and that is signed, and was intended to be signed, by Pearce only.

Passing now to the company's subsequent dealing with the machine: Some time in the early part of August, 1897, the company, who were about to confine their operations to Fort Gratiot, U. S., and to give up their works at Point Edward, passed a resolution to remove the machine from Canada to the United States. Norris



Judgment.

OSLER,  
J.A.

was one of the directors of the company present at the meeting when this resolution was passed, and the defendant Smith was another. Two others were the president, Thomas, and the secretary, and instructions were given in accordance with the resolution to a workman of the company at Point Edward to take the machine down and send it across the river. It was taken down accordingly, and the greater part of it was sent over and put up in the company's works at Fort Gratiot. The defendant Smith made the customs entry on the other side on the 18th of August, 1897, making for the purpose an affidavit in which he swore that he was the owner of the machine. At the trial he swore that he had told the officer that it had only been brought over to test it, as the company had not decided whether to keep it or send it back. After they had used it for some time it was resolved at another board meeting to take the machine over as the company's property, and Norris and Thomas, the defendant Smith, and the secretary, were also parties to that resolution.

It was so taken by the company in satisfaction of an old agreement by Pearce and Norris and a former partner of theirs, one Fitzgibbon, of the 7th of August, 1895, to furnish the company with two brick machines. Pearce is not shewn to have been a party to this transaction.

I think it is proved that the defendants, the company and Smith, knew that the plaintiff was a co-owner of the machine with Pearce and Norris.

I am unable, however, to find any evidence that the joint ownership of the partners had come to an end. Even had the quit claim of the 15th of January, 1898, been executed by both of the plaintiff's co-partners, it is confined to the interest in the patent alone, and whatever we might guess as to the situation of the partners after the 21st of August, 1897, when the mortgage of the 21st of August, 1896, was in default, I cannot hold that there is any proof of the plaintiff having become the sole owner of the machine either then or afterwards.

The plaintiff's right to recover, therefore, depends upon

whether what was done by his co-owner Norris and the company and Smith, was as against him tantamount to a conversion of his interest in the machine. The evidence appears to me to clearly establish a conversion if the act was unauthorized, for there was in that event a wrongful exercise of dominion over the chattel inconsistent with the plaintiff's right. The case of the company requires no observation. As to the defendant Smith, he was a director of the company and party to the resolution under the authority of which the company's men on this side took apart the machine and sent it across the river; he himself did the act which was necessary to be done on that side in order that it might be removed from the custom house and taken to the company's works at Fort Gratiot, and, finally, as director he was party to a subsequent resolution by which they acquired the title to the machine by accepting it in satisfaction of an old contract between the plaintiff's partners and the company: *Stephens v. Elwall* (1815), 4 M. & S. 259; *Hiort v. Bott* (1874), L. R. 9 Exch. 86; *Fowler v. Hollins* (1872), L. R. 7 Q. B. 616; (1875), L. R. 7 H. L. 757; *Dickey v. McCaul* (1887), 14 A. R. 166. That he was the servant or agent of the company cannot of course make even the slightest difference in his liability as these cases or some of them shew.

The real difficulty in the case is that the plaintiff was, when the machine was taken across the river, only the co-owner of the machine with Pearce and Norris, whose legal right to deal with it in a proper way not inconsistent with the plaintiff's right, is not in my opinion on this record successfully impeached, and whose title, or the title of the one they dealt with, the company would in that event acquire, thus becoming co-owner with the plaintiff.

Was that the character of the transaction, or was it such that it ought to be held to be a conversion of the plaintiff's share?

Blackburn, J., says, in *Harper v. Godsell* (1870), L. R. 5 Q. B., at p. 428: "It is a principle as old as Littleton (Co. Litt. 200a), that one joint tenant cannot maintain

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OSLER,  
J.A.

Judgment.  
OSLER,  
J.A.

trover against his co-tenant for the goods while they are in the co-tenant's possession. When the property is wrongfully destroyed, the action may be maintained."

*Mayhew v. Herrick* (1849), 7 C. B. 229, was a case which arose out of a seizure and sale by the sheriff under an execution against one partner of the whole of the partnership property. Coltman, J., said: "The authorities are too strong to be got over, that the mere sale of a chattel by one of two joint owners, is not a conversion as against the other."

Neither of course could it be a conversion by his vendees who would by the sale, or the sale and delivery, only become co-owners with the other.

The learned Judge goes on to say: "There may be such a dealing with the chattel by one of the joint owners, short of its absolute destruction, as would amount in law to a conversion." Maule, J., says that Littleton's doctrine is to be understood thus—that there may be dispositions of the subject matter which will amount to a conversion if done by a stranger, that are not so if done by a tenant in common. "But," he adds, "I do not think it therefore follows, that no dealing with the thing by one of two tenants in common, that does not amount to a total annihilation of it (if that be possible), can be a conversion as against his co-tenant. It may be that his co-tenant may, if he think fit, follow the thing, and make title to it, notwithstanding its sale and delivery to a third person. But it does not follow, that, where one tenant in common has dealt with the subject to an extent exceeding his authority,—as, where he sells out and out to a number of purchasers, who carry away the articles,—it would militate against the true understanding of the older authorities to hold that the party may treat that as a conversion."

These views appear to have been approved of in the House of Lords in *Jacobs v. Seward* (1872), L. R. 5 H. L. 464, the headnote of which on this point is: "In order to enable one tenant in common to maintain trover against

another, there must not merely be a carrying away of the property, but such a carrying away of it as will disable the party complaining from having the lawful use or benefit of the property, or there must be the destruction of it." Lord Hatherley put it thus (p. 474): "So long as a tenant in common is only exercising lawfully the rights he has as tenant in common, no action can lie against him by his co-tenant. \* \* It does not signify whether one or other of the tenants in common made use of it, it being made use of in an ordinary and legitimate way."

Judgment.

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 OSLER,  
J.A.

It must be conceded that the only thing which can be relied upon as constituting the conversion is the taking of the machine into a foreign country. I doubt whether the subsequent sale of it there affects the question except as it would tend to make it more difficult or inconvenient for the plaintiff to establish his claim.

The machine was manufactured and held by the plaintiff and his partners for use in this country in connection with their patent and to aid in disposing of territorial rights here to use the same. It was not in the contemplation of the owners that it should be removed from or sold out of this country. It differs in this respect from the case of the ship in *Heath v. Hubbard* (1803), 4 East 110, which was built for the purpose of being sent to sea and trading abroad. There the Court was inclined to the opinion, though not deciding the point, that the sale of the whole ship by one part-owner was not equivalent to the destruction of the subject matter of the joint ownership so as to enable his co-tenants to maintain trover. But in *Barnardiston v. Chapman* (1715), 4 East 121 (n.), where one tenant in common of a ship being in possession of it, the other forcibly took it away, secreted it from him, and changed its name so that he knew not where it was carried, and the ship was ultimately lost, in trover by the former the jury found that this was a destruction of the ship by the defendant's means, and the Court refused to disturb the verdict for the plaintiff.



Judgment. Somewhat similar to that case is *McNabb v. Howland* (1862), 11 C. P. 434.

OSLER,  
J.A.

There, the foundation of the plaintiff's recovery was the user of the joint property in an illegitimate manner inconsistent with his rights as co-owner. The same, I think, may reasonably be said in the case at bar. It may indeed be that the plaintiff might follow and make title to the chattel, as Maule, J., says in *Mayhew v. Herrick* (1849), 7 C. B. 229, but having regard to the inconvenience of doing that in a foreign jurisdiction, the possibility of his rights being regarded there differently from what they would be in this country, the extreme inconvenience and difficulty he would be put to in enforcing them and the improbability of his ever being able to "find a time to occupy in common," looking at what has been done with the property, I think we are justified in holding that there was a conversion, and that the plaintiff is entitled to recover the value of his share with costs.

I refer to *Pitt v. Albritton* (1851), 12 Iredell (N. C.) 74; *Wiggins v. White* (1836), 2 N. B. 179; *Rourke v. Union Ins. Co.* (1894), 23 S. C. R. 344.

In *Jacobs v. Seward* (1872), L. R. 5 H. L. 464, the Lord Chancellor appears to have been of the opinion that the facts in *Mayhew v. Herrick*, amounted to a conversion of the co-owner's share, and that the sale out and out to a number of purchasers of articles held in common might amount to conversion, looking at the difficulty of finding and following the purchasers.

I am therefore of opinion that the appeal should be allowed and judgment entered for the plaintiff for the sum of \$133.33, the value of his one-third share of the machine, with costs throughout.

MACLENNAN, J.A.:—

I think we ought to allow this appeal and to restore the judgment of Mr. Justice Rose.

Judgment.

MACLENNAN,  
J.A.

The plaintiff and Pearce and Norris were partners, and when the machine in question came into the possession of the defendant company it was the only asset of the partnership. The plaintiff's possession had ceased, and the plaintiff was a creditor of the firm for a sum exceeding the value of the machine. The plaintiff had an equity or lien upon the machine for the payment of his debt, and the other partners being persons of no property, that lien was his only means of obtaining payment. Under those circumstances the plaintiff was induced to lend the machine to the defendant company on the representation that they wanted to test its efficiency, and if the test should be favourable, to procure another like it. After using the machine for some time at Point Edward in Canada, the defendant company carried it across the river to Fort Gratiot in the United States. They did this with the consent of Norris and Pearce, who were directors of the company; and having got it there they bought it from those two persons in consideration of some antecedent dealings, having no relation whatever to the partnership. Now there is no doubt that at that time the legal property in the machine was vested in Norris and Pearce jointly with the plaintiff, and the plaintiff's right, ultra his legal title jointly with his partners, was merely equitable. It was to have it sold for the payment of his debt: Lindley, 6th ed., p. 358 *et seq.*; Pollock on Partnership, 6th ed., pp. 104, 105. The other partners could sell it for that purpose, and could give a good title to a *bonâ fide* purchaser; for it was their debt and they were interested in having it paid; but that is not what they did. Instead of selling it honestly for the best price they could obtain, and paying the proceeds to the plaintiff, they sold it to the defendant company, of which they were themselves directors, not for money but for some private consideration between themselves and the company. Now, the effect of that was, particularly having regard to the fact that the machine was removed to a foreign jurisdiction, to deprive the plaintiff of his equitable right, and a wrong for which the

Judgment. plaintiff is in my opinion clearly entitled to redress in a court of equity. If Norris and Pearce had sold merely their own interests in the machine to the company, the plaintiff could clearly enforce his lien against the company just as he could against his partners. In that case the company would have the right of having the partnership accounts taken in order to ascertain the amount of the plaintiff's lien, to have the chattel sold, and to have the surplus, if any, divided. The plaintiff has the same right now unless he is bound by the sale made by his partners. But the evidence, in my opinion, is clear that the removal of the machine to the United States, and the sale to the defendant company, were a fraud upon the plaintiff's rights as a partner, and were done with the intention of depriving him of his lien; and that both the company and the defendant Smith, were parties to and were responsible for the wrong.

The only remaining question is what redress the plaintiff is entitled to under the circumstances of the case, and first, can there be any redress without a partnership account? In my opinion no account is necessary. There are no debts due to anyone but the plaintiff, and it is admitted that the debt due to him exceeds the value of the machine, and that the other partners are not persons of any substance. A partnership account would therefore serve no useful purpose. At page 548 of Lindley on Partnership, 6th ed., the question when an action can be maintained between partners, without taking a partnership account, is answered by saying that each case must depend on its own circumstances, and upon whether justice can really be done without taking such an account. Here it is not necessary to take an account in order to do justice. The measure of the wrong done to the plaintiff is the full value of the machine. The defendants have not at any time offered to restore the machine, or to allow it to be sold, but have placed it beyond the plaintiff's reach, and insist that it is their property. I do not think the plaintiff is obliged to follow it to a foreign jurisdiction, but is

entitled to compensation in damages. The learned Judge Judgment.  
 at the trial has assessed the damages at \$400, and I think MACLENNAN,  
 his judgment should be restored. J.A.

Moss, J. A. :—

The plaintiff's case, though stated in his pleading with unwonted fullness and detail, is very simple. It is that he is the sole and absolute owner of the double brick machine in question, and that the defendants wrongfully deprived him of its possession and converted it to their own use.

If he can make this out his relief is clear. He is entitled to recover the full value of the machine.

The defendants answer the plaintiff's claim by denying his title and asserting that the machine was not his property, but the property of two other persons, Pearce and Norris, from whom they purchased or acquired it.

The first question, therefore, is as to the plaintiff's title, and upon his own testimony it is apparent that he never was more than a part owner of the machine jointly with Pearce and Norris.

[The learned Judge discussed the evidence and continued :]

Up to the time of its removal it had not ceased to be the property of the three partners.

Pearce and Norris might have disposed of the machine in due course of business to the defendants or any person, and if they did so the plaintiff could not impeach the purchaser's title. His only remedy would be against his co-owners.

Pearce and Norris did dispose of the machine to the defendant company, but not in the course of business, and such disposal operated only to pass their rights to the defendant company, in other words, to make the defendant company co-owners with the plaintiff, subject to the result of the partnership accounts: Lindley on Partnership, 6th ed., pp. 549 and 556, citing *Fox v. Hanbury*



Judgment. (1775), 2 Cowp. 445, and other cases of that class. See  
Moss, also *Harper v. Godsell* (1870), L. R. 5 Q. B. 422, and  
J.A. *Crossman v. Shears* (1879), 3 A. R. 583.

But unless the effect of such sale or disposal was to put it out of the power of the plaintiff to take the property or to pursue his remedy against the defendant company who got possession, trover would not lie against the co-owners nor against the purchasers who thereby became co-owners.

This is on the ground that each of the co-owners has a right to the entire possession and use of the property. A sale and delivery would not be enough to justify an action of trover: *Fouldes v. Willoughby* (1841), 8 M. & W. 540. In such case an action against Pearce and Norris to take the accounts in which they would be chargeable in respect of the machine would probably be maintainable, but the plaintiff might instead elect to look to the machine in the hands of the purchasers.

But unless the defendant company, after becoming co-owners with the plaintiff, destroyed the machine or did some act which was equivalent to its destruction, trover would not lie against them.

The remedy would be to establish a lien on the machine for any balance that might be found due to the plaintiff upon the accounts between him and Pearce and Norris.

No agreement giving the plaintiff a special property and right to possession, such as was shewn in *Nyberg v. Handelaar*, [1892] 2 Q. B. 202, has been shewn in this case.

The remaining questions are whether the defendants have been guilty of acts equivalent to a destruction of the machine and if so what damages the plaintiff is entitled to recover in this action.

He has not made Pearce and Norris parties nor sought an account against them. The accounts were not and could not be gone into in this action and the defendants cannot be bound by the plaintiff's general statements as to the partnership indebtedness to him. The rights of the

parties to this action must rest upon their position as co-owners, the plaintiff having an undivided one-third.

Judgment.

Moss,  
J.A.

There has been no physical destruction, for although certain dies and boxes, part of the machine, were left in Ontario while the remainder was taken to Fort Gratiot, it seems that these parts may be readjusted when required to work the whole machine.

Did the separation of the machine and the removal of parts to Fort Gratiot, in the United States of America, amount to its destruction, or to a destruction of the plaintiff's interest so as to entitle him to maintain this action?

In *Morgan v. Marquis* (1853), 9 Exch., at p. 148, Parke, B., said: "It is well established that one tenant in common cannot maintain an action against his companion, unless there has been a destruction of the particular chattel or something equivalent to it."

So far as is shewn by the evidence the machine was designed for use in Canada, the territory covered by the patent. Its removal to a foreign jurisdiction by one of the co-owners does not seem to have been in the contemplation of the parties.

Its continuance in Canada tended to preserve to the plaintiff intact the right stated by Littleton (Co. Litt. sec. 323) that "if two be possessed of chattels personal in common and one take the whole to himself out of the possession of the other, the other has no other remedy but to take this from him who hath done to him the wrong to occupy in common, etc., when he can see his time." See also *Fraser v. Kershaw* (1856), 2 K. & J. 496.

Its removal to another country deprives the plaintiff of the opportunity of asserting this common law right within our own territorial jurisdiction and compels him to have recourse to a foreign forum for the working out of his rights. It places him in the situation suggested by Martin, B., in *Fowler v. Hollins* (1872), L. R. 7 Q. B. at p. 635: "It was well put by the learned counsel for the plaintiffs that suppose the defendants had bought the cotton for a foreign

Judgment.

MOSS,  
J.A.

principal, and instead of carting the cotton to the railway station had carted it to the docks to be put on board a steamer to forward it to Bordeaux; could it be that the plaintiffs were bound to go to France to recover the value of their cotton and have no remedy against the defendants?"

By the removal to Fort Gratiot not only is the plaintiff's common law right to obtain physical possession of the machine "when he can see his time" impeded, but his equitable right to enforce a lien (if he has one) in our Courts is interfered with, and we need not assume in favour of the wrongdoers that in the foreign forum the plaintiff would find his rights recognized and enforced in the same manner as within our own territorial jurisdiction, and that he could not therefore suffer any prejudice.

In view of these results the case appears to fall fairly and reasonably within the rule applicable where the acts done amount to something equivalent to a destruction of the machine or of the plaintiff's rights as a co-owner.

The defendant company is, therefore, liable to the plaintiff, and I do not see how we can exonerate the defendant Smith from liability also. He took part in what is held to be a wrongful act, and although he acted as the officer or agent of the defendant company, and not for his own direct benefit, that does not free him. His principals had no authority to dispose of the machine in the manner it was disposed of, and in these circumstances it is no answer by him that he acted under their authority: *Stephens v. Elwall* (1815), 4 M. & S. 259, expressly approved of by the Law Lords in *Hollins v. Fowler* (1875), L. R. 7 H. L. 757. He was not a mere custodian without reference to the question of the property, or a conduit pipe, so as to bring himself within *Greenway v. Fisher* (1824), 1 C. & P. 190, even if that case can now be considered as authority after the observations made upon it in *Fowler v. Hollins* (1872), L. R. 7 Q. B. 616, and *Hollins v. Fowler* (1875), L. R. 7 H. L. 757.

But the plaintiff's damages must be restricted to one-third of the value of the machine, which was fixed by the learned trial Judge at \$400 =  $\$133\frac{33}{100}$ , for which sum judgment should be entered for the plaintiff.

Judgment.

Moss,  
J.A.

FERGUSON, J.:—

I agree in the judgment just read.

*Appeal allowed in part.*

R. S. C.

TOWNSHIP OF COLCHESTER NORTH V. TOWNSHIP OF  
GOSFIELD NORTH.

*Drainage—Report of Engineer—Failure to Take Oath—Amendment of Report—R. S. O. ch. 226, secs. 55, 75.*

Taking the oath prescribed in sec. 5 of "The Municipal Drainage Act," R. S. O. ch. 226, is an essential prerequisite to the exercise of jurisdiction by the engineer under section 75 of that Act.

While an appeal to the Drainage Referee against a report is pending the initiating municipality cannot refer back the report to the engineer for amendment.

Judgment of the Drainage Referee reversed.

THIS was an appeal by the Township of Colchester North from the judgment of the Drainage Referee, and was argued before OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 18th and 19th of January, 1900. The facts were complicated, and the appeal was argued at great length on the merits, but the short point upon which the appeal was decided is sufficiently explained in the judgment.

Statement.

*Britton, Q.C., and Langton, Q.C., for the appellants.*

*A. H. Clarke, for the respondents.*

March 27th, 1900. The judgment of the Court was delivered by



Judgment. LISTER, J.A.:—

LISTER,  
J.A.

This is an appeal by the Township of Colchester North against the judgment of the Drainage Referee, dismissing their appeal from the report, etc., of Mr. Newman, C.E., the respondents' engineer, in respect of the cleaning out and enlarging of the drain known as No. 15, or the 9th concession drain, Gosfield North.

The respondents, claiming to act under section 75 of the Drainage Act, initiated proceedings for the cleaning out and enlargement of the drain, and the making of a new outlet therefor in the appellant township, and on the 12th of March, 1898, appointed Mr. Newman to prepare a report, plans, specifications and estimates, in respect of the contemplated work, and to make an assessment.

The drain had been constructed by Gosfield under the authority of a local assessment by-law, duly passed on the 28th of August, 1880. It commenced at the south-easterly angle of the rear road and north side of the 9th concession road in Gosfield and extended to the west side of the town line between Gosfield North and Colchester North, thence along the west side of the town line to the south-west angle of lot 21 in the 10th concession of Colchester North, and thence westerly in Colchester North to the Canard River, in that township, where it discharged its waters.

The engineer, before entering upon the discharge of the duty which he had been appointed by the council to perform, subscribed and took the oath prescribed by section 5 of the Drainage Act, and, as appears by the jurat, this was done on the 20th of April, 1898.

The engineer's report, with plans, etc., were, on the 12th of May, 1898, laid before the council of Gosfield North, and approved. The report set forth that the drain in question and its branch, also in Gosfield North, were not deep enough nor of sufficient capacity to properly drain the lands they were intended to drain; that they were badly filled up with sediment, etc., and were in need of

repairing and enlarging, and that the outlet was insufficient to carry off the waters brought down by the drains ; and it recommended that, in order to better maintain the drain and its branch and to prevent damage to the lands and roads affected thereby, they should be cleaned out and enlarged in accordance with the plans, etc., of the proposed improvements which accompanied the report ; and it further recommended that a new outlet should be made, commencing on the westerly side of the town line between Gosfield North and Colchester North, opposite the 9th concession road in Gosfield North, thence westerly along the western side of the town line to the rear road, and thence westerly along the north side of the rear road to the Canard River, and for the cost of the proposed work, lands and roads in Gosfield North were assessed at the sum of \$3,272, and lands and roads in Colchester North at the sum of \$280.

The scheme thus recommended involved the enlargement and user by Gosfield North of a drain along the rear road, and entirely within the limits of Colchester North, constructed by that township under a local assessment by-law at the cost of its lands and roads, and unconnected with drain No. 15.

A by-law in the statutory form to authorize the work thereby recommended and to provide for its cost was provisionally passed, and a copy of the report, etc., was duly served on the appellants, who appealed therefrom to the Drainage Referee.

On the 22nd of August, 1898, and while the appeal made against the report was pending, the respondents adopted the following resolution : " Moved by Henry Barlow, seconded by James Newman, that the engineer's report for the repair of the 9th concession drain be referred back to the engineer to be amended according to instructions from the township solicitor. Carried."

On the 12th of September, 1898, at a meeting of council at Gosfield North, a resolution in the following words was adopted : " Moved by James Newman, seconded by A. J.

Judgment.

LISTER,  
J.A.

Judgment.

LISTER,  
J.A.

Scratch, that the repair of the 9th concession drain under the report of William Newman be abandoned, and the clerk notify the clerk of Colchester North. Carried." And subsequently at that meeting, the report which forms the subject of the present appeal was laid before the council and adopted. Attached to it was the oath which had been taken by the engineer before entering upon the duty which resulted in the former report, the work under which had, by the resolution of the 12th of September, been abandoned.

A copy of the second report (which differs in some respects from the first) was served upon the appellants, and they appealed therefrom to the Drainage Referee, who gave judgment dismissing their appeal, and from that judgment the appellants now appeal.

It is admitted that the engineer's oath, which was attached to the second report when that report was presented to the council on the 12th of September, was the oath taken by the engineer before commencing to perform the work which resulted in the former report, and that no other oath was subsequently taken by him, and that, except in so far as the resolution of the 22nd of August can be regarded as an appointment, the engineer was not appointed by the council to examine and report with respect to the work recommended by the second report.

I am of opinion that the report cannot be upheld either as an amended or as an original report.

Assuming the resolution of the council of Gosfield of the 22nd of August to be free from the objection that it might be regarded as an interference with the independent judgment of the engineer, it is quite clear that it did not and could not confer any authority to amend the report.

The evidence shews that when this resolution was adopted an appeal from the report to the Drainage Referee was pending, and therefore the Drainage Referee alone had jurisdiction, with the consent of the engineer and upon evidence given, to amend it: *Townships of Adelaide and Warwick v. Metcalfe* (1900), 27 A. R. 92. But even if the engineer had jurisdiction to amend it, I think that the resolution

adopted by the council of Gosfield North on the 12th of September must be looked upon as not only an abandonment of the work recommended by the report, but an abandonment of the report itself. The second report, therefore, can in no sense be regarded as an amended report, but must be treated as an original report, and its validity as such must depend upon whether the essential antecedent conditions prescribed by the statute were complied with. What the respondents did in respect of the proposed drainage work was done under the authority of section 75 of the Drainage Act, R. S. O. ch. 226. That section empowers a municipal council to undertake and complete any of the works thereby authorized "on the report of an engineer or surveyor appointed by them," and section 5 of the same Act declares that "Any engineer or surveyor employed or appointed by any municipal council to perform any work under the provisions of this Act, including the assessment of real property for the purpose of drainage work, shall, before entering upon his duty, take and subscribe the following oath: 'In the matter of the proposed drainage work in the township of \* \* : I \* \* make oath and say, that I will, to the best of my skill, knowledge, judgment, and ability, honestly and faithfully and without fear of, or favour to, or prejudice against, any owner or owners, or other person or persons whomsoever, perform the duty assigned to me in connection with the above work and will make a true report thereon.'"

Judgment.

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 LISTER,  
J.A.

By the Drainage Act wide and extensive powers are conferred on the municipal council with respect to the construction and maintenance of drainage works and the imposition of taxes on lands to meet the cost thereof. It, however, declares that such powers shall be exercised by the council only upon the report of an engineer appointed by the council, and who, before entering upon his duty, has taken and subscribed the oath prescribed by section 5. The statute for obvious reasons imperatively requires that an engineer who has been appointed by a municipal council to assess and charge the lands of individuals



**Judgment.**

**LISTER,  
J.A.**

(perhaps against their wish) with the cost of a drainage work shall, before entering upon his duty, be sworn to discharge that duty faithfully and impartially, and it is the right of those whose lands are assessed for such a work to have them assessed by an engineer legally appointed and who is acting under the obligation of an oath. Courts sometimes construe the word "may" as imperative, and the word "shall" as directory. When, however, it is clear from the language of the Act that the Legislature intended to impose a duty, and not simply to confer discretionary power, the word "shall" must be construed as mandatory. "It is hard case law," said Mr. Justice Taschereau, in *Trenton v. Dyer* (1895), 24 S. C. R. at p. 479, "that though the statute decrees that a certain thing 'shall' be done, it 'may' not be done, or need not be done, and I for one will always restrict the application of that law within the narrowest possible limits."

As being somewhat analagous in principle, reference may be made to the judgment of Meredith, C. J., in the recent case of *Re Burnett and Town of Durham* (1899), 31 O. R. 262, where it was held that the failure of an arbitrator to take the oath required by sec. 458, R. S. O. ch. 223, rendered his award void. See in addition to the authorities there referred to *People v. Connor* (1866), 46 Barb. 333; *Crossett v. Owens* (1884), 110 Ill. 378; *Spring v. Lowell* (1805), 1 Mass. 422; *Cambria Street* (1874), 75 Pa. St. 357; *Frith v. Justices* (1860), 30 Ga. 723.

It seems to me that the taking the oath in accordance with the terms of section 5 was essential in order to vest in the engineer jurisdiction to enter upon the performance of any of the work specified in section 75. It is jurisdictional and therefore failure to take it renders a report made under the Drainage Act a mere nullity. These objections to the report being, as I think, fatal to its validity, I do not think it necessary to discuss the other questions raised and argued. It follows that the appeal must be allowed with costs.

*Appeal allowed.*

R. S. C.

## ARMSTRONG V. LYE.

*Merger—Equitable Right to a Charge—Subsequent Acquisition of the Fee—*  
*R. S. O. ch. 121, secs. 8, 9, 10.*

In taking the accounts under the judgment reported 27 O. R. 511, and 24 A. R. 543, it was held that the defendant had no right to an equitable charge, in priority to the plaintiff's claim, for sums paid by him to prior encumbrancers before the conveyance of the land to him, his potential equity not bringing him within sections 8, 9 and 10, of R. S. O. ch. 121, and there being no evidence of intention to preserve the right to the equitable charge.

Judgment of ROBERTSON, J., affirmed.

APPEAL by the defendant Lye from the judgment of ROBERTSON, J. Statement.

The question in the appeal was whether, in taking the accounts directed by the judgment in this case, reported 27 O. R. 511, 24 A. R. 543, the defendant Lye was entitled to charge as against the plaintiff the full amount of the Gooderham mortgage and of the Cameron and Boswell judgment, or whether there had been in whole or in part a merger of either claim.

The appeal was argued before OSLER, MACLENNAN, MOSS, and LISTER, JJ. A., on the 6th of December, 1899.

*Aylesworth*, Q. C., and *F. A. Hilton*, for the appellant. The question in dispute is concluded by the previous judgments, but if the question is treated as open the proper conclusion to be drawn is that the appellant intended to keep the charges alive. It would have been an act of folly on his part to allow the charges to become merged. *Toulmin v. Steere* (1817), 3 Mer. 210, is relied on by the respondent, and certainly goes far in his favour. But that case has been criticized and doubted and is no longer of authority, the tendency of the later cases being in favour of the view that there is no merger: see *Liquidation Estates Co. v. Willoughby*, [1896] 1 Ch. at p. 734; [1898] A. C. 321; *Gregg v. Arrott* (1835), 2 L. & G. at p. 251; *Watts v. Symes* (1851), 1 D. M. & G. 240; *Stevens v. Mid-Hants*

**Argument.** *R. W. Co.* (1873), L. R. 8 Ch. at p. 1069 ; *Adams v. Angell* (1877), 5 Ch. D. 634 ; *In re Pride, Shackell v. Colnett*, [1891] 2 Ch. 135 ; *Thorne v. Cann*, [1895] A. C. 11. The statutory provisions, R. S. O. ch. 121, secs. 8 and 9, and R. S. O. ch. 51, sec. 58, sub-sec. 3, are also important, the English statutory provision corresponding to the latter sub-section being explained in *Snow v. Boycott*, [1892] 3 Ch. 110.

*Watson*, Q. C., and *H. C. Osborne*, for the respondent. The judgment as entered must govern, and by it this question is left open. On the merits the judgment appealed from is right. The appellant reduced the charges for the benefit of his own estate, and it would be very dangerous to act now on *ex post facto* evidence of intention : *Heney v. Low* (1862), 9 Gr. 265 ; *Hart v. McQuesten* (1875), 22 Gr. 133.

*Aylesworth*, in reply.

March 27th, 1900. The judgment of the Court was delivered by

Moss, J. A. :—

This appeal is the aftermath of the judgments reported in 27 O. R. 511 and 24 A. R. 543.

Pursuant to the judgment as finally settled Mr. Cartwright, Official Referee, proceeded with the reference directed, and made his report on the 22nd of November, 1898. Amongst other matters he reported that he had found that the charges existing against the lands in question on the 20th of October, 1891, were at the date of his report still existing as charges against the said lands to the amount of \$35,464.70, made up of two principal items, viz. : (1) amount due on the Gooderham mortgage, \$30,591.91 ; (2) amount due on Boswell and Cameron judgment, \$4,872.79.

In arriving at these sums the learned Referee made no deductions for payments made to or received by Gooderham

in respect of his mortgage which were paid by the defendant Lye or derived from securities placed by him in Gooderham's hands as collateral to his mortgage.

Judgment.

Moss,  
J.A.

The effect of the finding is that the defendant Lye was held entitled to the benefit of the Gooderham mortgage as a prior charge on the lands to the full extent to which it was a charge on the 20th of October, 1891, viz., \$21,073.21, together with subsequent interest and payments for taxes, although in Gooderham's hands the amount had been reduced by payments made by or through Lye to between \$8,000 and \$9,000, and further that Lye was also entitled to hold the Boswell and Cameron judgment as a continuing charge in his favour for the full amount of principal and interest.

The plaintiff appealed from the report, contending that the Referee's conclusions were erroneous; that the amount due in respect of the Gooderham mortgage should have been reduced by all sums received on account thereof from or through the defendant Lye; that he should have found that the Gooderham mortgage was a charge only for the amount still due and payable to Gooderham in respect thereof; and that the Boswell and Cameron judgment constituted no charge on the lands as against, or in priority to, the plaintiff's charge.

The appeal was heard by Robertson, J., who gave effect to the plaintiff's contentions, and referred the report back to the Referee to find and report what was due at the date of the report on the prior charges which existed on the 20th of October, 1891, whether reduced by Rankin or the defendant Lye.

From that judgment the defendant Lye appealed to this Court, contending that the Referee's report should be restored.

Upon the argument of the former appeal before this Court it was stated, and the Court assumed, that before the 1st of November, 1892, when Rankin executed the conveyance of the lands to him, the defendant Lye had paid Gooderham the amount of his mortgage, and had



Judgment. become the assignee of the mortgage (see pp. 546 and 553 of the report).

Moss,  
J.A.

It now appears that this was a mistake. Lye had not paid off Gooderham nor procured an assignment of the mortgage, and (although the mortgage has not been produced on this occasion either) the fact is that Gooderham still continues to hold it, and that there is due and owing to him a sum of \$8,632.50 with interest from the 8th of November, 1897.

It is apparent from the judgments then pronounced that the conclusion of the majority of the Court would have been the same, or perhaps strengthened, if the actual fact had appeared.

The present appeal must be dealt with from the standpoint of the position of the parties on the 20th of October, 1891, when the plaintiff's claim became a completed charge—of which the defendant Lye had notice and knowledge—upon the lands in question.

From that day the plaintiff had a status with respect to the lands which neither Rankin nor the defendant Lye could interfere with or disturb save with his sanction or consent.

At that time there were two charges against the lands prior to the plaintiff's, viz., the Gooderham mortgage and the Boswell and Cameron judgment. With regard to the first of these Lye had made the agreement of the 8th of May, 1891, with Gooderham, under which he had become liable to pay the amount secured thereby within one year, and was entitled upon such payment to an assignment thereof, but the Boswell and Cameron judgment continued in their hands.

On the 13th of May, 1892, a further agreement was made between Rankin and Lye under which the latter agreed to purchase and acquire the Boswell and Cameron judgment, and other arrangements were made as to the share or interest Lye was to have in the lands, or the proceeds of a sale thereof, but these could not and did not affect the plaintiff's position.

In accordance with the agreement Lye did purchase the Boswell and Cameron judgment, and it was assigned to him by an instrument under seal dated the 15th of June, 1892. At this time there was an execution against lands issued upon the judgment and in the hands of the sheriff as of a date prior to the plaintiff's claim. The execution expired on the 31st of July, 1892, in default of further renewal.

Judgment.

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Moss,  
J.A.

Lye had not paid Gooderham in full within the year as provided by the agreement of the 8th of May, 1891, but between that date and the 1st of November, 1892, he had made or had caused to be made a number of payments upon the mortgage.

Therefore, before taking the conveyance of the 1st of November, 1892, Lye had no estate in the lands, but he was entitled to an equitable charge in his favour for all sums he had paid or caused to be paid upon the Gooderham mortgage, and also for the amount of the Boswell and Cameron judgment. He had made the payments to Gooderham and to Boswell and Cameron as the holders of prior charges at the request of the owner of the equity of redemption and in order to save the lands, and he was entitled to occupy, to the extent of such payments, the position of those to whom they were made.

While this was the position Lye made the arrangement with Rankin represented by the conveyance of the 1st of November, 1892, and the contemporaneous agreements, whereby the moneys due to and liabilities incurred by Lye in respect of the Gooderham mortgage and the Boswell and Cameron judgment were expressly made part of the consideration or purchase money. In other words, the amounts so paid or to be paid are treated as so much money paid on Rankin's account, and repaid upon the transaction of the conveyance of the lands. As between Rankin and Lye the effect was the same as if the former had handed so much money to the latter in repayment of an advance. Thereafter he could not have maintained an action against Rankin to recover the amount. On the

Judgment. contrary, the latter was entitled to be discharged from the  
Moss, claim, and to be indemnified against all claims in respect of  
J.A. either the mortgage or the judgment.

In the circumstances of this case I think the defendant Lye cannot maintain the equitable charge he held before the conveyance as a charge existing in priority to the plaintiff's charge.

The 8th, 9th and 10th sections of R. S. O. (1887) ch. 102, now secs. 8, 9 and 10 of R. S. O. ch. 121, which he has invoked, do not aid him.\* He was not a mortgagee or assignee of a mortgagee within the meaning of those sections, nor the interpretation clauses of the Act—certainly not so literally, and it has been said that they are not to be extended beyond their letter.

In *Bank of Montreal v. Thompson* (1862), 9 Gr. 51, Esten, V.-C., referring to the original Act, 14 & 15 Vict. ch. 45, said (p. 58): "This provision is a very singular one and not to be extended beyond its letter. \* \* I certainly would not extend this provision to a person who was not a mortgagee at the time, but became so afterwards."

In *Finlayson v. Mills* (1865), 11 Gr. 218, Spragge, V.-C., held that to make the Act apply there must be two mortgages each forming a charge upon the same property, and that it had no application where the assignee *pro tanto* of a vendor's lien holding in priority to the assignee of the remainder subsequently took a conveyance of the

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\* 8. Any mortgagee of freehold or leasehold property, or any assignee of such mortgagee, may take and receive from the mortgagor or his assignee a release of the equity of redemption in such property, or may purchase the same under any judgment or decree or execution without thereby merging the mortgage debt as against any subsequent mortgagee or person having a charge on the same property.

9. In case such prior mortgagee or his assignee acquires the equity of redemption of the mortgagor in the manner aforesaid, no subsequent mortgagee or his assignees shall be entitled to foreclose or sell such property without redeeming or selling, subject to the rights of such prior mortgagee or his assignee, in the same manner as if such prior mortgagee or his assignee had not acquired such equity of redemption.

10. The preceding two sections shall not affect any priority or claim which any mortgagee may have under the registry laws.

land to himself. And upon rehearing, this view was concurred in by VanKoughnet, C., and was not dissented from by Mowat, V.-C., who agreed in affirming the decree.

Judgment.

Moss,  
J.A.

In the present case the legal estate was in Gooderham, and the judgment though assigned to Lye had ceased to be a lien at law upon the lands by reason of failure to renew the writ of *fi. fa.* lands. So that Lye had nothing but a potential equity to a lien in respect of the payments made by him, but even if the lien of the judgment was still in existence it is questionable whether the statute would apply to it.

If then, Lye is unable to avail himself of the provisions of the statute, the question must be determined upon the intention of the parties and the presumptions of law in reference thereto.

From the papers and the account given of the transaction of the 1st of November, 1892, it is to be gathered that the parties were not intending to preserve such right as Lye then had to a lien upon the lands, but the contrary. It cannot be questioned that the amount of the plaintiff's claim was considered in arriving at the \$45,000 stated as the amount of the purchase money and that it was supposed it was to be paid by Lye.

Rankin had created the charge in reduction of a larger sum for which he was liable upon his bond to Mrs. Hutchins and there is no doubt that he was desirous and even solicitous that the amount should be paid. Lye says that it was at his suggestion that the reference in the memorandum of agreement to the plaintiff's claim was expressed as it is, and it is fair to assume that the reason for his suggestion being assented to was not because he was not to pay it if it was an existing debt, but because Lye had some doubt as to whether or not it was existing.

As I remarked in 24 A. R., at p. 548, Lye took Rankin's position as regards the land. His action in no way deprived the plaintiff of his lien upon the lands or of his right to enforce it by the ordinary process of the law.

In this state of the case Lye could not be permitted to



Judgment. set up a claim to retain a prior charge to the prejudice  
Moss, of the plaintiff, or to invoke the provisions of the statute  
J.A. to enable him to do so.

In *Finlayson v. Mills* (1865), 11 Gr. 218, Mowat, V.-C., said, p. 229 : "I cannot suppose that the Act was intended to put it out of the power of parties to give priority to a subsequent incumbrance. The object of the Legislature rather was, I apprehend, to prevent a merger of the debt by the operation of any technical rule where such a result would contravene the intention of the parties, and not to prevent a merger where a merger is necessary to give effect to the intention of the parties."

He proceeded to point out that at the time of the passing of the Act some legislative enactment for the purpose was, no doubt, deemed necessary in view of the then general understanding of the effect of *Toulmin v. Steere* (1817), 3 Mer. 210, but that since the passing of the Act the course of judicial decision had done the same thing or nearly the same thing in England.

And no doubt the once recognized general rule that a man cannot own an estate and also a charge upon it, thus being at the same time debtor and creditor to himself has been greatly modified : *Adams v. Angell* (1877), 5 Ch. D. 634 ; *Thorne v. Cann*, [1895] A. C. 11 ; *Liquidation Estates Co. v. Willoughby*, [1898] A. C. 321.

Where the owner of a charge becomes the owner of the estate by devise or inheritance the presumed intention to keep alive the charge is not readily displaced. But as pointed out by Mowat, V.-C., in *Finlayson v. Mills* (p. 225), where the owner of a charge becomes owner of the estate by bargain and purchase the case is somewhat different. In such case it may not be the wish or expressed intention or interest of such owner alone that is material, the interest of the debtor whose estate has been acquired is material also.

Upon the whole I think Lye is not entitled to claim as against the plaintiff that his equitable right to a charge was not merged in or extinguished by the conveyance

of the estate to him by the deed of the 1st of November, 1892. Judgment.

Moss,  
J.A.

Upon the same grounds it follows that the payments made upon the Gooderham mortgage since the date of the conveyance must be considered as made by Lye as owner of the premises, and in order to reduce the incumbrance.

He does not occupy the position of a purchaser who after his purchase has paid off a prior incumbrance and procured an assignment either to himself or a trustee for him.

In any case the payments he made for taxes that accrued after the conveyance must be presumed to have been made in his character of owner of the estate rather than as an incumbrancer with some other person primarily liable to pay the taxes upon the lands.

I think the appeal should be dismissed.

*Appeal dismissed.*

R. S. C.

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## EWING V. HEWITT.

*Nuisance — Highway — Obstruction — Continuing Nuisance Created by Another.*

The owner of a house abutting on a highway placed without authority a trap-door in the sidewalk in order to obtain an entrance to his cellar, the hinges of the trap-door projecting about an inch above the sidewalk. The defendant obtained title from this owner and continued to use the trap-door, and the plaintiff, while lawfully using the highway, stumbled against the hinges and was hurt :—

*Held*, that the defendant could not be held to be continuing the nuisance, as she had no title to the highway, and no right, strictly speaking, to remove the trap-door constructed by another, and that, as the accident was not caused during or by her user of the trap-door, she was not liable.

Judgment of MEREDITH, C. J., reversed, LISTER, J. A., dissenting.

**Statement.** APPEAL by the defendant from the judgment at the trial.

The following statement of the facts is taken from the judgment of LISTER, J. A. :—

The action was brought to recover damages for personal injuries occasioned, as it is alleged, by an obstruction in the highway maintained and continued by the defendant.

The plaintiff between seven and eight o'clock of the evening of the 13th of February, 1897, while walking south along the west side of Peter street in the city of Toronto, carrying some twenty-five or thirty pounds of coke on his back, tripped against one of the hinges of a flap door covering an area or opening under the sidewalk in front of the hotel owned and occupied by the defendant, situate on the south-west corner of Queen and Peter streets, and fell, sustaining serious injuries.

The area or opening was covered with two iron flap doors which were fastened to the sidewalk with six hinges, three on each door. The hinges were bevelled and were about a quarter of an inch thick at the ends and increased in thickness up to the knuckle, and at and with the knuckle projected about one inch above the level of the sidewalk. The opening was connected with the defendant's premises and used by her for the purposes of her business. In 1893, her predecessors in title substituted

the iron flap doors for wooden doors, which, theretofore, Statement.  
had covered the opening. The doors and hinges were at the time of the accident in about the same condition as when placed there in 1893.

To recover damages for the identical injuries which the plaintiff sues for in this action, he brought an action against the city of Toronto. The defendants there claimed that they were entitled to a remedy over against, and to be indemnified by, the defendant here, for the damages therein claimed by the plaintiff, and they, by appropriate proceedings taken under the provisions of the Judicature Act, obtained an order by which the defendant here was made a third party in that action. By this order it was, *inter alia*, ordered as follows: "And it is further ordered that the said Margaret E. Hewitt between herself and the defendants shall be bound by any judgment the plaintiff may recover herein, and the trial of the question between the defendants and the said Margaret E. Hewitt shall be tried immediately after the trial of this action or later as the Judge at the trial may direct."

That action was brought on for trial and judgment was pronounced dismissing it before this present action was begun.

The defendant by her statement of defence, besides denying all the allegations in the plaintiff's statement of claim, pleaded (1) contributory negligence; (2) that the doors and hinges complained of were as of right and without negligence erected, constructed, and maintained, at the place in question; (3) *res adjudicata*.

The present action was tried before MEREDITH, C. J., with a jury, and the jury viewed the *locus in quo*.

The learned Chief Justice put the following questions to the jury and received the following answers:

"Did the hinge form an obstruction to the street so as to interfere with the use of it with safety by the travelling public? Yes.

Was the hinge properly constructed, having regard to



**Statement.** the purpose for which the doors were to be used and the place where they were situate? No.

What damages is the plaintiff entitled to if entitled to recover? \$400."

He reserved all questions of fact not submitted to the jury and necessary to be determined for the purpose of deciding the case to be determined by himself, and he found that the plaintiff's injuries were occasioned as he alleged, and entered judgment in his favour.

The appeal was argued before BURTON, C. J. O., OSLER, MACLENNAN, MOSS, and LISTER, JJ. A., on the 27th of November, 1899.

*Marsh*, Q. C., for the appellant. The case has been erroneously treated as if the defendant had maintained a nuisance on her own premises, and that in consequence thereof injury resulted. But in the first place the evidence does not justify the finding that the hinge was an obstruction, and in the second place, even if it does, the fact that the defendant did not construct the doors in question and has no title to the sidewalk where they are has been lost sight of. She cannot be made liable for an obstruction in the highway which she did not cause, and which she has no legal right to remove: *Dillon*, 4th ed., 656 (a), 656 (b). The defendant might be liable if, in using the doors, she were guilty of negligence, but there is no suggestion of anything of the kind here. Apart from this the judgment in the former action is an estoppel.

*John MacGregor*, and *R. G. Smyth*, for the respondent. There was ample evidence to support the findings and the case is the simple one of a nuisance maintained by a person whose duty it is to abate it. Not having fulfilled that duty the liability arises. Any person who interferes with the condition of a highway is liable for any injury resulting from its being left in a less safe state than it was in before such interference: *Irvine v. Wood* (1872), 51 N. Y. 224.

*Marsh*, did not reply.

March 27th, 1900. BURTON, C. J. O.:—

Judgment.

BURTON,  
C.J.O.

The plaintiff, who has apparently suffered a serious injury, has been very unfortunate in his litigation if it shall be now held that he cannot recover against the defendant in this action.

He brought an action in the first instance against the city of Toronto, who brought in the defendant as third party, but failed on the supposition that this case was governed by *Ray v. Petrobia* (1874), 24 C. P. 73, and I think the plaintiff would probably have been better advised if he had carried that case to appeal instead of bringing this action.

The facts are very fully and fairly stated in the judgment prepared by my brother Lister, and the only point on which I differ from him is that there is not any evidence of an adoption of the obstruction sufficient to make the defendant liable in damages for its alleged continuance. It goes without saying that any person continuing a nuisance created by another on his own premises would be liable to any person sustaining an injury: 1 Com. Dig. 419.

In most of the English cases the property of the person owning the land on the side of the street extends to the centre of the street, so that the purchaser is continuing a nuisance on his own property. Very little authority is to be found in this country where the soil and freehold in the highway are in the Crown or in a stranger.

The original wrongdoer was the defendant's predecessor in title, and he or his estate would possibly be responsible, and it would be no answer for them to urge that they have no authority to enter upon the highway for the purpose of removing it, but that is a consequence of the original wrong and they cannot be permitted to excuse themselves from paying damages by shewing their inability to remove it, but how does that apply to the present owner of the premises as no property passed to her in any portion of the street?

I quite agree in the remarks of Lord Esher: "If some-

Judgment.

BURTON,  
C.J.Q.

thing is put in the highway without authority and is left there, so that it becomes that which is generally called a nuisance, but which is really an obstruction, and if a person, lawfully using the highway, falls over it, or is otherwise injured by it, the person putting it in the highway must make compensation." (*Moore v. Lambeth Water Works Co.* (1886), 17 Q. B. D. at p. 465.)

This is sound sense as well as sound law, but is no authority for holding this defendant liable, who had nothing to do with constructing the door, and who caused no injury to any one in the user of it, and who was under no obligation to remove it.

American cases can be found in favour of the view that even though the obstruction is upon the public highway, the owner of the premises adjoining is liable if he uses it for his own benefit. Among these is a case of *Irvine v. Wood* (1872), 51 N. Y. 224, where the action was against Fowler the landlord and the tenant Wood, the excavation having been made apparently by the owner in fee, previous to granting a lease to one Higgins of which the defendant Fowler had an assignment. The lease to the defendant Higgins was of the premises 596 Broadway, bounded by the south-east side of Broadway, with the appurtenances, which latter words seem to have been regarded as material. The Court in giving judgment say this hole was clearly appurtenant to the premises leased by the defendant Wood. They adopted it as appurtenant to their premises, and used it; and this made them responsible for it. Treating it, therefore, as part of the thing demised, for which Wood paid rent, judgment in that case might perhaps be supported.

The Court referred to an English case, *Rex v. Pedley* (1834), 1. A. & E. 822, but it does not, in my opinion, give any support to the plaintiff's contention. The nuisance complained of there was the erection of a building on the owner's own land, of which the occupation was likely to produce a nuisance, and did for want of proper care cause a nuisance, and it was held that not

only the original owner, but the purchaser from him, were liable to be indicted. That proposition cannot be questioned.

Judgment.  
BURTON,  
C.J.O.

But in the present case there is no pretence that the lease to the defendant professed to pass the excavation under the highway or that it could be regarded as appurtenant.

I have been unable to find any case in the English decisions or our own to support the present judgment.

In a recent case, referred to in my brother Lister's judgment, *Braithwaite v. Watson* (1889), 5 T. L. R. 331, the judgment proceeded on the ground that the tenant for the time being was bound to keep the premises let in a reasonably safe condition.

And in all the other English cases the liability proceeded on the same grounds.

In the absence of authority binding upon me I am unable to hold that the judgment below can be supported.

The answers of the jury are in this view of the case immaterial, and upon the question of *res judicata* I agree with the judgment of my brother Lister.

OSLER, J.A. :—

The soil and freehold of the highway were in the Crown, and the defendant, as owner of the freehold of the adjoining premises, except for the purpose of ingress and egress had no interest in the highway beyond the right of user *quâ* highway which every member of the public enjoys. She did not create or place the alleged nuisance in the street, and acquired no title to it or right to deal with it by becoming the owner of the adjoining premises by a title derived from the person who had done so. It appears then to follow that there was no legal obligation upon her to remove it, and if not how can she be said to have maintained the nuisance by leaving it just as the person who made it had left it? The mere fact that she occasionally used the cellar flaps in the way or for the



Judgment.

OSLER,  
J.A.

purpose for which they had been formerly used, not repairing nor in any other manner actively keeping them up or increasing the nuisance arising from the fact of their existence carries the case no further against her. I think the appeal must be allowed.

MACLENNAN, J. A.:—

I am of opinion that this appeal should be allowed.

There was no right whatever in the adjacent householder to construct the hatch in question, or the passage under the street with which it was connected, and the whole responsibility for its original construction rested with the person who did it. The present defendant is now the owner of the house by a title derived from the person who constructed the passage, and placed the hatch over it, but she has no title to the passage-way or the hatch. Her liability, therefore, if any, must arise from the circumstance that the passage and the hatch have a physical connection with her house, and that she has made more or less use of the passage, opening and closing the hatch, since she acquired her title. I am unable to perceive any principle upon which she can be held liable for the plaintiff's injury, which arose from his striking his foot against the hinge of the hatch while passing along the street. To make the defendant liable there must have been some duty resting upon her to remove the hinge. If she had never used the passage, or raised or lowered the hatch, there would be no ground on which a duty to remove the hinge could be rested; and I cannot understand why the circumstance that she has used the passage, and in doing so has raised and lowered the hatch, imposed that duty upon her. The accident to the plaintiff was not in any way the result of such use by her; after such use it remained as before. Indeed, I do not see what right or power she had either to remove it or to change its condition, if she desired to do so. At all events, she had no greater right or power than any other citizen. It is vaguely said that by using the passage

and the hatch she *maintained* it, and is therefore liable. Judgment.  
 I cannot apprehend the force of that argument. The MACLENNAN,  
 owner of land may be said to maintain a nuisance existing J.A.  
 thereon, whether it was placed or caused by himself or by  
 some predecessor in title ; but in the latter case the duty to  
 abate arises from the ownership, because every owner may  
 be said to maintain whatever structure or object may  
 happen to be upon his land.

In my judgment the action cannot be maintained, and  
 ought to have been dismissed.

Moss, J.A. :—

I am of the same opinion.

LISTER, J. A. :—

There can be no doubt that the hinge was the cause of  
 the injury to the plaintiff; the trial Judge so found and  
 the jury found in answer to the questions submitted to  
 them that it was not properly constructed and that in  
 consequence of its improper construction it constituted an  
 obstruction to the street which rendered the street unsafe  
 for persons using it. The findings of the jury dispense  
 with the necessity of considering and determining whether  
 the placing of the hinge at the *locus in quo* was or was  
 not lawfully authorized.

If authorized, it was, on the jury's findings, improperly  
 or negligently constructed and unsuitable for the place in  
 which it was put and therefore became a nuisance. It is  
 contended that there is no evidence to support the jury's  
 findings. The evidence was conflicting and not entirely  
 satisfactory but I do not think it can be said that there  
 was no evidence proper to be submitted to and considered  
 by them. Referring to the functions of judges and  
 juries, Lord Halsbury, in *Metropolitan R. W. Co. v.*  
*Wright* (1886), 11 App. Cas., at p. 156, said : " If reason-  
 able men might find (not 'ought to' as was said in *Solomon*  
*v. Bitton*) the verdict which has been found, I think no  
 Court has jurisdiction to disturb a decision of fact which  
 the law has confided to juries not to judges."

Judgment.

LISTER,  
J.A.

Applying this principle to the present case there is, as it seems to me, no ground for interfering with the findings of the jury, and the defendant, in so far as they affect her rights in the present action, is concluded by them.

The nuisance not having been created by the defendant but by her predecessors in title, the question arises whether she has so maintained, continued or adopted it, as to fasten a liability on her, to any person who, without fault, suffers injury by reason of its presence at the *locus*.

The evidence establishes that the opening or area way was constructed for the benefit of the defendant's premises ; it communicated with the cellar and was used for access thereto for the purposes of the business carried on in the house ; that the defendant had so used it up to the time of the accident ; and that the iron flap doors which covered the opening with the hinges attached thereto had been placed there by her predecessor in title. I think the evidence further establishes that the doors and hinges were at the time of the accident in about the same condition as when originally placed there.

The question of the liability of persons in respect of areas on the highway and defective coverings thereon has been, as might be expected, frequently considered by the American Courts, with the result that the rule of liability is, that any person who without special authority makes or continues a covered excavation in a public street for a private purpose is, in the absence of negligence in the party injured, responsible for all injuries resulting from the way being thereby rendered less safe, irrespective of any degree of skill in the party who makes or continues the excavation. The rule is comprehensively stated in the 4th edition of Judge Dillon's work on Municipal Corporations, at p. 1309, sec. 1032, in these words : " No person, not even the adjoining owner, whether the fee of the street be in himself or in the public, has the right to do any act which renders the use of the street hazardous or less secure than it was left by the municipal authorities. Whoever does so, whether by excavations made in the sidewalk by

the abutter, or by unsafe hatchways left therein, or by opening, or leaving open, an area way in the pavement, \* \* which make the use of the street unsafe or less secure, is guilty of a nuisance, and is liable to any person who, using due care, sustains any special injury therefrom; and in such cases, the person who created or continues the nuisance is thus liable, irrespective of the question of negligence on his part."

Judgment.

LISTER,  
J.A.

The learned author cites numerous cases in support of, and which fully sustain, the rule as stated, among which are *Congreve v. Smith* (1858), 18 N. Y. 79; *Gridley v. Bloomington* (1873), 68 Ill. 47. Also see *Irvine v. Wood* (1872), 51 N. Y. 224, where it was held that if an excavation is made by license of competent authority, the one making it is bound to do it in a careful manner and so that it is properly and carefully covered so as to make the street as safe for passengers as before. A liability attaches to whomsoever subsequently continues and uses it in an improper and unsafe condition.

The abutting proprietor, in England, is, subject to the public user, the owner of the soil and freehold of the highway *ad filum viæ*, and may, as of right, sink a cellar or area under the highway, if done in such a way as not to render it unsafe or dangerous to persons using it, but, if it be negligently or improperly constructed or negligently maintained or continued whereby the highway is rendered dangerous or unsafe for public travel, it becomes a nuisance, and not only the person who created the nuisance but the person who maintains or continues it is liable to any person who without fault is injured by it.

The ancient case of *Regina v. Watts* (1704), 1 Salk. 357, is an illustration of the liability of one who continues a nuisance on the highway. There the defendant was indicted for not repairing a house standing on the highway; he occupied the house as tenant at will, and whether he was liable was the question. The Court said: "The *ratione tenuræ* is only an idle allegation; for it is not only charged, but found, that the defendant was



Judgment.LISTER,  
J.A.

occupier, and in that respect he is answerable to the public ; for the house was a nuisance as it stood, and the continuing the house in that condition is continuing the nuisance."

And so in *Fisher v. Prowse* (1862), 2 B. & S. 770, where the defendant was tenant of a house adjoining a street with a cellar belonging to it, the mouth of the cellar opened into a street by a trap door which projected above the footway and over which the plaintiff stumbled and fell, sustaining injuries for which he sued. The case turned on whether the way was dedicated to the public with the cellar flap on it, and was therefore subject to its being there. "We think," said Blackburn, J., in delivering the judgment of the Court, " \* \* that the flap did cause obstruction to the footway to such an extent that if the flap had been put down for the first time, after the highway was dedicated to the public, it would have been a nuisance for the consequences of which those who maintained the nuisance would have been responsible." And again he says: "The law is clear that, if after a highway exists anything be newly made so near to it as to be dangerous to those using the highway, such, for instance, as an excavation (*Barnes v. Ward* (1850), 9 C. B. 392), this will be unlawful and a nuisance \* \* and those who make or maintain the nuisance in either case are liable for any damage sustained thereby, just as much as if the nuisance arose from an obstruction in the highway itself."

*Coupland v. Hardingham* (1813), 3 Camp. 398, cited with approval in *Barnes v. Ward*, was an action for not railing or guarding an area before a house in Westminster, whereby the plaintiff fell down and was severely hurt. The defence was that the premises had been in the same condition as far back as could be remembered, and before the defendant became possessed of them. Lord Ellenborough held "that however long the premises might have been in this situation, as soon as the defendant took possession of them, he was bound to guard against the danger to which the public had been before exposed, and that he was liable for the consequences of having neglected

to do so, in the same manner as if he himself had originated the nuisance.”

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LISTER,  
J.A.

And in *Braithwaite v. Watson* (1889), 5 T. L. R. 331, the plaintiff sued for injury caused by the negligence of the defendant in allowing her cellar plate in the pavement opposite her premises to be loose and not properly fastened. This the defendant denied, and she stated that she took part of the house furnished, with the use of the cellar for two months, at a weekly rent, and at the time of the accident was such tenant. Manisty, J., said there could be no doubt that the tenant for the time was bound to keep the premises let in a reasonably safe condition.

*Pretty v. Bickmore* (1873), L. R. 8 C. P. 401, was an action for injuries sustained by the flap of a coal cellar under the footway giving way. Bovill, C. J., said: “The person who is in possession of the premises and allows the coal plate to be in a dangerous condition is the person responsible to the public for any injury resulting from its being out of repair.”

See also *Hadley v. Taylor* (1865), L. R. 1 C. P. 53; *Gwinnell v. Eamer* (1875), L. R. 10 C. P. 658; *Tarry v. Ashton* (1876), 1 Q. B. D. 314; *Whiteley v. Pepper* (1877), 2 Q. B. D. 276; *Sandford v. Clarke* (1888), 21 Q. B. D. 398; and *Blackmore v. Vestry of Mile End Old Town* (1882), 9 Q. B. D. 451, approving *White v. Hindley Local Board of Health* (1875), L. R. 10 Q. B. 219.

Then, with respect to the objection that the judgment in the former action operates as a bar by way of estoppel as *res judicata* to the plaintiff's right to recover against the defendant in this action, the answer is, that the defendant was not as between the plaintiff and defendant a defendant in that action: *Eden v. Weardale Iron and Coal Company* (1884), 28 Ch. D. 333; (1887), 35 Ch. D. 287.

On the whole I think with much submission the judgment ought to be affirmed.

*Appeal allowed, LISTER, J. A., dissenting.*

R. S. C.

## REGINA V. ST. CLAIR.

*Criminal Law—Summary Trial—Habeas Corpus—Certiorari—Evidence—Depositions in Other Proceedings—Counsel's Consent—Public Morals—Keeping House of Ill-fame.*

A conviction by a magistrate under the sections of the Criminal Code relating to the summary trial of indictable offences may be brought up for review by writs of *habeas corpus* and *certiorari*.

Upon the hearing of a charge under these sections evidence in other proceedings against another prisoner is admissible upon the consent of the accused's counsel.

Nature of evidence to prove a charge of being an inmate of a house of ill-fame, considered.

Judgment of FALCONBRIDGE, J., affirmed.

Statement. THIS was an appeal from the judgment of FALCONBRIDGE, J., and was argued before OSLER, MACLENNAN, MOSS, and LISTER, JJ. A., on the 17th of January, 1900. The facts are stated in the judgment.

*E. B. Stone*, for the appellant.

*John R. Cartwright*, Q. C., for the Crown.

January 31st, 1900. The judgment of the Court was delivered by

OSLER, J. A. :—

The appellant was convicted before the police magistrate of the town of Peterborough for that she was, on the 21st of November, 1899, an inmate of a bawdy house or house of ill-fame in the said town, and she was sentenced to be imprisoned in the Mercer Reformatory at Toronto for six months.

The conviction was made under secs. 783, 784 of the Criminal Code, part 55, "Summary trial of indictable offences."

A *certiorari* was issued in aid of the *habeas corpus* under which the magistrate returned the conviction and the examinations and other proceedings concerning the same. The motion for her discharge having been refused,

the prisoner now appeals to this Court, pursuant to sec. 6 of R. S. O. ch. 83.

Judgment.

OSLER,  
J.A.

The writ of *habeas corpus* is marked in the margin "*Per statutum tricesimo primo Caroli Secundi Regis*," and is issued from the High Court, but is not signed by the Judge who awarded the same, as it ought to have been. The return, or what purports to be the return, of the gaoler does not certify the cause of detention as it ought to have done, but it has been assumed, no doubt correctly, that it is under the warrant of commitment annexed to the writ. The writ itself does not appear to have been filed at any stage of the proceedings, and it would not be difficult to point out other indications of the increasing laxity and slipshod style of modern practice.

It was objected that such a conviction as the one in question could not be reviewed by means of the writs of *habeas corpus* and *certiorari*, and the decisions were cited in reference to cases arising under part 54 of the Code, secs. 762-781, "Speedy trials of indictable offences."

The conviction is a summary conviction, like that in question in *Regina v. Gibson* (1898), 29 O. R. 660, under Part 55 of the Code, upon a charge the jurisdiction of the magistrate to try which is absolute, not dependent upon the consent of the accused, and which is probably subject to be set aside on motion on proper grounds.

Such a conviction, although a record or matter of record in the sense in which all summary convictions by justices are so: Paley on Convictions, 5th ed., pp. 157, 158, is of a different character from the judgment of the Court of Record, expressly constituted as such under Part 54 of the Code, and I therefore see no reason why it should not be enquired into upon *habeas corpus* and *certiorari* in the same manner and to the same extent as any other summary conviction. Section 798 no doubt says that such a conviction shall have the same effect—whatever that may now mean—as a conviction upon an indictment for the same offence, but nevertheless it is not the same thing.

Compare the cases upon garnishment orders, which



Judgment. have "the effect of," but yet are not "judgments":  
 OSLER,  
 J.A. *Cremetti v. Crom* (1879), 4 Q. B. D. 225; *In re Frankland* (1872), L. R. 8 Q. B. 18; *Best v. Pembroke* (1873), L. R. 8 Q. B. 363.

On the question of the purpose and extent of the Ontario Habeas Corpus Act, originally 29-30 Vict. (1866) ch 45, "Wood's Act," which was taken from the Habeas Corpus Act of 56 Geo. III. ch. 100 (1816), *In re Melina Trepanier* (1885), 12 S. C. R. 111, and *Regina v. Mosier* (1867), 4 P. R. 64, may be referred to. It has, I think, yet to be decided whether its scope is wider than that of its prototype, which excludes criminal matters and process in civil suits: see *per* Patteson, J., in *Carus Wilson's Case* (1845), 7 Q. B. 984, 1010. Secs. 5-7 enable the court or judge to direct the issuing of a *certiorari* as ancillary to the writ of *habeas corpus*, whether awarded under that Act or the Act of Charles, or at common law, and sections 6 and 7 confer the right of appeal upon the prisoner if remanded.

The question then is whether any sufficient ground was shewn for discharging the appellant. No fault appears in the commitment or on the face of the conviction, but it is contended that upon the depositions returned with the *certiorari* there appears no evidence to support the conviction; and, therefore, that the prisoner ought to be discharged as being in illegal custody under an erroneous conviction; since it is only reasonable that a person should not be detained in custody on a conviction which would be quashed if brought upon the Court in another form: Paley on Convictions, 5th ed., p. 400.

If there was evidence upon which the magistrate might have convicted, he was the judge of the weight to be attached to it, and it is not for us to rehear the case or to sit in appeal from his decision.

It appears that one Macdonald had been charged before the magistrate with being the keeper of the house in question and that she had been convicted. The charge against the appellant then came on to be heard and she and her

solicitor, according to the magistrate's return to the *certiorari*, not unreasonably consented that the evidence given by the witnesses, one of whom was the appellant, on the hearing of the charge against Macdonald, should be read and taken as having been given pro and con on the charge against the appellant herself, if and so far as such consent could warrant the magistrate in acting upon it.

Judgment.

OSLER,  
J.A.

Applying such evidence to the appellant's case so far as it affected her the magistrate convicted. It is now urged in her behalf (1) that the consent as given could not make the depositions on the Macdonald charge evidence against her, and (2) that even if they were admissible the evidence did not go far enough to prove the charge.

I am of opinion that the consent was effectual to admit the depositions in the Macdonald case as evidence on the charge against the appellant. Under the former convenient classification of crimes as felonies and misdemeanours, the abolition of which, I think for my own part, is much to be regretted, such a charge was a misdemeanour simply and the competency of the accused or her counsel to make admissions at the trial for the purposes of the trial was undoubted.

In *Rex v. Foster* (1836), 7 C. & P. 495, on an indictment for felony for having in his possession a mould for the purpose of coining, the prisoner was acquitted; a second indictment for a related felony was then presented, the evidence on which was to be the same as in the former case. Counsel for the prosecution said that with the assent of the prisoner's counsel he proposed not to call the witnesses again. Patteson, J., said he doubted if that could be done, even by consent, in a case of felony, though he knew it might be in a case of misdemeanour. The witnesses were, therefore, recalled and resworn, and the evidence they had given read over to them from the Judge's notes.

*Regina v. Thornhill* (1838), 8 C. & P. 575, was an indictment for perjury (a misdemeanour it may now be necessary to say). The attorneys agreed upon the trial that the

Judgment.

OSLER,  
J.A.

formal proofs on the part of the prosecution should be dispensed with, and that part of the case for prosecution admitted. Counsel having unfortunately not been informed of this arrangement declined to make any admission at the trial. Lord Abinger said: "In a criminal case, tried in the Crown side of the assizes, I cannot allow any admission to be made on the part of the defendant, unless it is made at the trial by the defendant or his counsel."

In Roscoe on Criminal Evidence, 12th ed., p. 120, it is said, citing these cases: "In cases of misdemeanour evidence may be taken by consent."

Mr. Stone argued that in these cases both the indictments were against the same prisoner, but I do not see how that can make any difference in the principle, which is that in cases of misdemeanour admissions may be made, or consent given to admit as evidence what, without such consent, must have been proved in the ordinary way.

Section 690 of the Code, now concedes the principle to a limited extent in all cases, providing that any accused person *on his trial* for any indictable offence, or his counsel or solicitor, may admit *any fact alleged against* the accused so as to dispense with proof thereof. This perhaps hardly goes far enough for the purposes of the present case: see *Regina v. Ray* (1890), 20 O. R. 212.

Then, as to whether there is in fact evidence of the charge: Lane, a baker, proved that the appellant was an inmate of the house, and he spoke also of the general reputation of the house as being a house of ill-fame. The chief of police said the house had that reputation, and that when he went to make the arrest he found in the house Macdonald, Margaret Foley, and the appellant; the two former tried to escape. On reading over the warrant, Macdonald said she would be damned if she would go, and also that he, the chief of police, might have given her a chance to get out, to which he replied that he had given her one chance and she did not take it.

One Washburn knew Macdonald and her house and that it was reputed to be a house of ill-fame. Had been look-

ing for such a house, when in Peterborough, and was taken there by two men whom he had asked if they knew such a house. He went in and while there lay with the appellant and paid her \$5.00. Many other witnesses spoke of the house having the reputation of a house of ill-fame, or a bawdy house, or a "fast" house, but they had never known of or seen anything actually wrong or disorderly about it; and there was some evidence of men having been seen going to the house at a late hour of the night on one occasion. There was, in short, no evidence of disorderly conduct, except on the single occasion sworn to by Washburn, but there was a remarkable unanimity in the evidence of the numerous witnesses who spoke of the reputation of the house.

Judgment.

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 OSLER,  
J.A.

In the face of these depositions, it cannot be said that there was no evidence in support of the charge.

"In some cases the offence consists of a series of transactions as in indictments for barratry and keeping a house of ill-fame": Roscoe's Criminal Evidence, 11th ed., p. 86.

"It is a cumulative offence. It is not necessary to prove who frequents the house, which in many cases it might be impossible to do, but if unknown persons are proved to have been there conducting themselves in a disorderly manner it will maintain the indictment": *Ibid*, pp. 773, 774; *J'Anson v. Stuart* (1787), 1 T. R. 748, 754.

It is not necessary that the indecency or disorderly conduct should be perceptible from the exterior of the house: *Regina v. Rice* (1866), L. R. 1 C. C. R. 21.

Evidence of the general reputation of the house seems to be admissible or has been held to be so, but I am not prepared to say that such evidence alone would be sufficient to convict. Such a reputation is not acquired without acts or conduct capable of proof from which the character of the house may be inferred, such as the character of the women as being common prostitutes and the fact of men visiting the house, at all hours and dissolute and disorderly behaviour there. As Lord Hardwicke says in *Clarke v. Periam* (1742), 2 Atk. at p. 339, speaking



Judgment.

OSLER,  
J.A.

of cases "where the character is the particular issue to be tried. Suppose in the case of an indictment for keeping a common bawdy house, without charging any particular fact, though the charge is general, yet at the trial you may give in evidence particular facts, and the particular time of doing them." That, I think, points to the proper way of proving the charge. Witnesses who speak simply to a general reputation without being able to point to anything particular, may easily attribute the character of a common bawdy house or house of ill-fame to a house to which, however irregular may be life of its inmates, the law does not affix that character. In the present case, there was proof of an act of prostitution by one of the inmates of the house which had at that time acquired such a character as to be pointed out to the person who was the other party to the act as being such a house as he was looking for, *i. e.*, a house of ill-fame or bawdy house where women might be found who would prostitute themselves to all comers. The conduct of the women when arrested and what they said were not improper to be considered. I may refer to the case of *Regina v. McNamara* (1891), 20 O. R. 489, where this question was examined. I am not prepared, however, to concur unreservedly in the observations made in the case there cited by my learned brother Rose from Dudley's South Carolina Reports, p. 346.

On the whole I think there was some evidence upon which the magistrate, unless he believed the evidence given by the appellant and her friends, was warranted in convicting, and that being so, we cannot interfere.

*Appeal dismissed.*

R. S. C.

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## CLIFTON V. CRAWFORD.

*Will—Construction—Legacy—Survivorship—Accruer.*

A testator gave a legacy of \$500 to each of three grandchildren, and directed "the said moneys so bequeathed to be kept invested by my executors and the same with accrued interest to be paid over to the said grandsons on their attaining their majority, and the said legacy to my said granddaughter to be paid to her with the interest accrued thereon on her attaining her majority or on her marriage, whichever event shall first happen. In case of the death of any one of my said grandchildren the bequests and legacies to them in this my will contained shall be divided among and go to the survivor or survivors of them, share and share alike." One of the grandsons died under age and unmarried, and then the granddaughter died under age and unmarried. The other grandson attained his majority and the executor paid him the whole amount of the legacies. In an action by the personal representative of the granddaughter seeking payment by the executor of half of the legacy given to the grandson who died first and the accumulations thereon :—

*Held*, that the share of the deceased grandson's legacy which accrued to the granddaughter on his death passed on her death to the surviving grandson, and that the plaintiff was not entitled to it.

Judgment of STREET, J., reversed.

APPEAL by the defendant Crawford from the judgment of STREET, J.

Statement.

The question involved in the action was the construction of certain provisions in the will of one William Clifton, who died on the 17th of December, 1877, having, on the 4th of September, 1876, made the will in question, the material portions of which were as follows:—

"I will, devise and bequeath out of my personal estate and effects to each of my grandchildren (the children of my son, John Clifton) the following legacies, namely:— To my granddaughter, Zilla Clifton, the sum of five hundred dollars, and to my grandsons, William and Thomas Clifton, each the sum of five hundred dollars.

The said moneys so bequeathed to be kept invested by my executors and the same with accrued interest to be paid over to the said William and Thomas on their attaining their majority and the said legacy to my said granddaughter, Zilla, to be paid to her with the interest accrued thereon on her attaining her majority or on her marriage,

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whichever event shall first happen. In case of the death of any one of my said grandchildren the bequests and legacies to them in this my will contained shall be divided and go to the survivor or survivors of them share and share alike."

By a subsequent clause the testator gave to his granddaughter Zilla another legacy of \$1000.

All three grandchildren survived the testator. William Clifton died on the 26th of January, 1893, under age and unmarried; Zilla Clifton died on the 11th of February, 1893, under age and unmarried, and Thomas Clifton died on the 12th of April, 1897, having attained the age of 21 years, and having made a will, of which the defendants Watson and Watchorn were executors.

The defendant Crawford was the surviving executor of the will of William Clifton, the elder, and he had paid to the grandson Thomas Clifton, the whole of the three legacies. The plaintiff was the personal representative of Zilla Clifton, and contended that she was entitled to one-half of the share of the grandson William Clifton, and brought this action for the construction of the will of William Clifton, the elder, administration of his estate, an account, payment, and other relief.

The action was heard on motion for judgment by STREET, J., who held that on the death of the grandson William his legacy vested in the survivors, Zilla and Thomas, but that on the death of Zilla, while her legacy of \$500 vested in Thomas, her share of William's legacy was not divested but went to her personal representative. He therefore gave judgment in the plaintiff's favour with costs.

The appeal was argued before MACLENNAN, MOSS, and LISTER, JJ. A., on the 21st and 22nd of March, 1900.

*B. F. Justin*, for the appellant. The survivorship clause attaches to the accrued share as well as to the original legacy.

[MACLENNAN, J. A.: Is it clear that the original legacies were not vested?]

Argument.

Yes. The legacies were contingent and the survivorship clause took effect: Theobald, 4th ed., p. 554. Besides this question has not been raised; the plaintiff claims only one half of the legacy of the grandson William, and even as to this her claim fails. The wording of the clause shews that it was intended to apply to any accrued share as well as to any original legacy, and to give everything to the ultimate survivor or survivors: *Wilmot v. Flewitt* (1865), 11 Jur. N.S. 820; *Roy v. Shikhareswar* (1882), L.R. 10 Ind. App. 51; *Douglas v. Andrews* (1851), 14 Beav. 347; *Goodman v. Goodman* (1847), 1 DeG. & S. 695; *In re Chaston*, *Chaston v. Seago* (1881), 18 Ch. D. 218; *Forrester v. Smith* (1852), 2 Ir. Ch. 70; *Vorley v. Richardson* (1856), 8 D. M. & G. 126.

*B. N. Davis*, and *J. E. Cook*, for the respondent. On the death of William his legacy vested in Zilla and Thomas in equal shares, and on Zilla's death only her original legacy passed to Thomas: *Pearman v. Pearman* (1864), 33 Beav. 394; *Ex parte West* (1784), 1 Bro. C.C. 575; *Bright v. Rowe* (1834), 3 My. & K. 316; *Vandergucht v. Blake* (1795), 2 Ves. 534; *Perkins v. Micklethwaite* (1714), 1 P. Wms. 274; *Rickett v. Guillemard* (1841), 12 Sim. 88. The words "survivor or survivors" do not show any intention to effect a double accrual, and the plural term "bequests and legacies" is explained by the fact that two legacies are given to Zilla.

*Justin*, in reply.

May 15th, 1900, MACLENNAN, J.A.:—

The authorities establish that when the payment of legacies is postponed, and there is a gift over in case of death, that means death before the time of payment, and not merely death in the life-time of the testator: Theobald, 3rd ed., p. 449; 2 Jarman, 5th ed., p. 1569. These three



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legacies therefore did not vest absolutely at the testator's death, but became liable to be divested afterwards by death before the time of payment.

The question then arises whether there is a sufficient indication in this will of an intention that the accrued share should survive as well as the original legacies; for the rule is established that unless such an intention be found in the language of the will the accrued share must be held not to survive.

On this question I have with great respect come to a different conclusion from my learned brother. The language used is not very clear, but yet I think it is sufficient; although what he says is that in case of the death of *any one* of my grandchildren there is to be a survivorship, which might mean that there was only to be a survivorship at the death of the first one, and not also at the death of the second. I think the contrary is sufficiently indicated by the use of the words "*survivor or survivors*," and therefore I think there was a survivorship, not only of William's legacy, but also of Zilla's. This conclusion is further greatly strengthened by the words, "*the bequests and legacies to them*," as expressing what was to be divided and to go over to the survivor or survivors. But these last words not only shew that there was to be survivorship on the death of the second, as well as the first, but I think they also shew that the accrued share was to go over also. Zilla was to get her own legacy of \$500 if she lived to be twenty-one or married, but she was also to get at least a share of the legacies to her brothers on certain contingences, and she was to get that other share by virtue of the will. If the event occurred by which she became entitled to it, it was as much a legacy as the \$500. That is to say, the share of William's legacy, to which Zilla became entitled by his death under age, was *a legacy* given to her by the will. Then what the testator has said is that the *bequests and legacies to them in this my will contained*, shall go to the survivor or survivors, and I do not think

he could have used stronger or plainer language to indicate his intention, that not only the original bequest, but the accruing bequest, should survive. Unless we can say that the accruing bequest, or legacy, is not a bequest, or legacy, *in the will contained*, we cannot in my judgment relieve it from the divesting words. I think the words used here are quite as strong as in most of the cases in which it has been held that accruing shares survived. See the cases cited, 2 Jarman, 5th ed., pp. 1523, 4, 5; and Theobald, 3rd ed., pp. 479, 80. In my opinion the appeal should be allowed and the action should be dismissed.

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MACLENNAN,  
J.A.

MOSS, J.A. :—

The substantial question is whether the gift over to survivors on the death of a legatee in this will embraces shares accrued in consequence of the prior death of another legatee as well as the original bequest. In other words, whether the testator has in his will shewn that he intended the accruing shares to go over as well as the original shares.

A testator may manifest this intention in at least two ways. He may so declare in language that can only be held to have that meaning, or he may so deal with the fund as to shew that he intended it to be kept together in an aggregate fund, so that in the event of the death of all but one, the whole, or all, shall go to that one: *Worlidge v. Churchill* (1792), 3 Bro. C. C. 466; *Douglas v. Andrews* (1851), 14 Beav. 347; *Wilmot v. Flewitt*, (1865), 11 Jur. N. S. 820. Where a testator has used words indicating that he contemplated a plurality of shares in one person, they will be read as applying to accrued shares, otherwise they would stand without meaning.

In the case *In re Chaston, Chaston v. Seago* (1881), 18 Ch. D. 218, the will gave the residuary estate to be divided into nine equal parts, one of which he gave to each of his sons and daughters, except one, to whom he gave the income of

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one-ninth for his life. Then followed a provision for vesting the share of any one of them who died before it was paid to or received by him or her, in the others. Then came a direction that in case of the death of any one or more of the sons or daughters, leaving lawful issue, the executors and trustees of the will should "stand and be possessed of the legacy and bequest, or legacies and bequests," for the issue. There was besides, in a subsequent clause, a reference to accrued or added shares. One question was, whether a share of the legacy or bequest to one brother, Robert, which, upon his death, had devolved upon another brother, John, who had died leaving issue, passed to John's issue.

Mr. Justice Fry said (p. 224): "In the first place does 'the gift over relate to the added or accrued shares? 'Does the gift over relate only to the original ninth 'share taken by John, or does it relate to the share 'of Robert's share which is also taken by John? Now, 'in the first place, I find words of plurality, 'legacy or 'legacies, bequest or bequests.' If the gift over is to 'apply only to the original share, there is no meaning in 'the added words. But the added words are there, and 'I must give them some meaning, and I can see no mean- 'ing so natural as to apply them to the accrued shares.'" His view was strengthened by the subsequent reference to the accrued or added shares, but I think that without that he would have held the words of plurality to be sufficient. In the present case the words are "bequests and legacies." There is no express reference to accrued or added shares, but, nevertheless, though not without hesitation, I have come to the conclusion that taking the whole clause together, it contains sufficient to give over shares accruing by survivorship.

The testator uses the expression that in case of the death of "any one" of his said grandchildren, "the bequests and legacies to them shall be divided, etc." I think the words "any one" may well be read as meaning

"any." He disposes in such case of the bequests and legacies to "them," shewing that he does not intend "any one" to mean "only one," or one only. And reading further it appears that the bequests and legacies to them may go to "the survivor." If he had not used the word "survivor," or had used the word "survivors" only, there might have been difficulty in saying that he intended the gift over to include more than the original legacy. But he appears to have contemplated the case of the bequests and legacies taken by all three being concentrated in one survivor, and to have provided, though not in accurate language, for two cases; one, of there being two survivors, in which case the bequests and legacies to the deceased one should be divided between such survivors; the other, of there being only one survivor, in which case all the bequests and legacies should go to that one.

I am not disposed to attach much weight to the words "in this my will contained," for I think they merely express what would be implied, and that if the words were, "the bequests and legacies to them shall be divided, etc." their meaning would be the same.

On the whole I think the appeal should be allowed.

LISTER, J.A. :—

I agree.

*Appeal allowed.*

R. S. C.

# CONFEDERATION LIFE ASSOCIATION V. LABATT.

*Sale of goods—Want of title—Damages.*

The purchaser of a chattel is entitled to recover from the vendor upon failure of title, the value of the chattel, and not merely the amount paid by him to the vendor.

Judgment of ROBERTSON, J., reversed in part.

APPEAL by the third parties, Moore and the MacWillie Company, Limited, from the judgment at the trial.

Judgment.

Moss, J.A.

Statement.



Statement.

The action was brought to recover damages for the conversion of an elevator, the property of the plaintiffs. The defendant contended that the elevator had been sold to him by the third parties, and claimed indemnity from them. (See 18 P.R. 238.)

The action was tried at Toronto on the 23rd and 24th of March, 1899, before ROBERTSON, J., who, on the 22nd of April, 1899, gave judgment in favour of the plaintiffs against the defendant for \$450 damages and costs, and in favour of the defendant against the third parties for indemnity for the full amount of damages and costs recovered by the plaintiffs, and also for the defendant's costs.

The appeal was argued before OSLER, MACLENNAN, MOSS, and LISTER, JJ. A., on the 5th and 6th of February, 1900. The argument was directed mainly to the question of who was in fact the vendor to the defendant of the elevator in question. It was also contended by the third parties that in any event they were not liable to the defendant in a greater sum than the purchase money paid by him and lost by him on the failure of title, viz. \$160, and his expenses incurred in connection with the sale.

*Shepley, Q.C., and W. H. Irving, for the appellants.*

*Aylesworth, Q.C., and N. W. Rowell, for the defendant.*

*A. J. Russell-Snow, for the plaintiffs.*

May 15th, 1900, OSLER, J.A.:—

The action is for the wrongful conversion of an elevator and its connections, the property of the plaintiffs, which had been erected on their premises at the north-east corner of Yonge and Richmond Streets, Toronto, at one time leased by them to a firm of MacWillie Brothers, who carried on business there as grocers. The MacWillie Company, Limited, was incorporated for the purpose of taking over the stock in trade and fixtures and carrying on the business

Judgment.

OSLER, J.A.

which had been carried on by the firm. The defendant alleged that he had purchased the property in question from the company and one J. D. Moore, the mortgagee of the stock and fixtures which had been taken by the company, or from one of them, and he caused a third party notice to be served upon them claiming indemnity as upon a warranty of title. On the 22nd of September, 1898, the Master in Chambers made an order allowing the third parties to defend and take part in the trial of the action and directing that the question of liability as between the defendant and the third parties should be tried after the trial of the plaintiffs' action. (See 18 P.R. 238.) The trial Judge gave judgment for the plaintiffs against the defendant for \$450 damages with costs; and on the trial, which proceeded at the same time, of the defendant's claim to indemnity, he found "that neither Moore nor the company had any right, title or interest in the elevator, and that it was sold and disposed of to the defendant by the defendant Moore, acting in concert with the MacWillie Company or through the MacWillie Company, without colour of right," and he gave judgment in the defendant's favour against both of the third parties with costs for the full amount of the damages and costs recovered by the plaintiffs against him.

The plaintiffs' judgment against Labatt is not in question, but the third parties dispute their liability to indemnify him, or to indemnify him to the full extent of the recovery against him, and the first question to be determined is from whom he bought the elevator. His contention is that Moore was the vendor, or Moore and the company, or, if the company was the nominal vendor, that Moore was the real vendor using the company's name, or that he sold as agent for the company, or as mortgagee.

[The learned Judge discussed the evidence and came to the conclusion that Moore was not the vendor and continued:]

Judgment.

OSLER, J.A.

I think therefore that the defendant's claim against Moore fails.

As to the MacWillie Company: They undoubtedly sold as owners and cannot successfully deny their liability to indemnify their vendee, *Eichholz v. Bannister* (1864), 17 C.B.N.S. 708: but they contend that recovery as against them must be limited to the amount of the purchase money paid by Labatt.

There is no case in the English Courts or our own which expressly decides that unliquidated damages may be recovered on the breach of an implied warranty of title. In all the reported decisions on the subject the recovery has been confined to the price paid, but in all these cases the claim was simply one to recover back money paid as upon a failure of consideration: *Eichholz v. Bannister* (1864), 17 C.B.N.S. 708; *Raphael v. Burt & Co.* (1884), Cab. & Ell. 325; *Peuchen v. Imperial Bank* (1890), 20 O.R. 325.

In Benjamin on Sales (1899), 7th Am. ed. from the Eng. ed. of 1892, and in earlier editions published in the author's lifetime, it is said: "*Eichholz v. Bannister* was on the money counts and therefore strictly speaking only decides that the price may be recovered back by the buyer on the failure of title to the thing sold; but as the *ratio decidendi* was that there was a warranty implied as part of the contract there seems no reason to doubt that the vendor would also be liable for unliquidated damages for breach of warranty."

In the fourth edition of Judge Chalmers' work on "The Bills of Sale Act, 1893," it is pointed out that this suggestion has been adopted in that Act.

In the most recent edition of Mayne on Damages (1899) the subject is not noticed.

In America there is much diversity of opinion both in the text writers and decisions. In Sedgwick on Damages, 8th ed., (1891), vol. 2, p. 492, the general rule is said to be that "the measure of damages for breach of a warranty

of title to a chattel is the value of the chattel at the time of the purchase with interest, and the necessary costs of defending a suit brought against a vendee to test the title, with interest from the time of payment. But the vendee may disaffirm the contract and recover the consideration paid, though that is greater than the value of the property."

It is remarkable that the editors do not discuss or even refer to *Eichholz v. Bannister*, one of the two leading English cases on the question of an implied warranty of title, and cite only *Morley v. Attenborough* (1849), 3 Ex. 500, for the English law on the subject.

In *Sutherland on Damages* (1882), vol. 2, pp. 418, 419, it is said: "The value of the property at the time the vendee is dispossessed has been held to be the measure of damages. Generally, however, the measure has been stated to be the purchase money and interest; thus adopting the same rule that is applied generally in estimating the damages for breach of covenants for title to real estate. . . . Where the vendee is dispossessed by suit, and has, in good faith, incurred expenses in defending it, he is entitled to recover these also from the vendor as an additional item of damages."

It appears to me that the law is accurately stated in the passage quoted from Mr. Benjamin's learned work and that the vendee, going upon a breach of the implied warranty, is entitled to recover the value of the thing he has lost in consequence of the failure of the vendor's title. Can less be supposed to have been in the contemplation of the parties when the sale was made? Why should a loss by failure of title be less fully compensated than a loss by breach of warranty of quality? The case appears to fall fairly within the general rule of the Common Law, as stated by Parke, B., in *Robinson v. Harman* (1848), 1 Ex. at p. 855, that "where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed."

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OSLER, J.A.



Judgment.

OSLER, J. A.

An exception to this general rule exists in the case of a contract for the sale of real estate, where, if the vendor without fraud is incapable of making a good title, the proposing purchaser is not entitled to recover damages for the loss of his bargain: *Bain v. Fothergill* (1874), L.R. 7 H.L. 158. This exception is founded, as Lord Hatherley points out, upon the essential difference between a contract for the sale of real estate and a contract for the sale of a chattel. (p. 211.) In the former the purchaser knows that there must, with all the complications of our law, be an uncertainty as to making out a good title. In the latter the vendor must know what his title is.

See also *Engell v. Fitch* (1869), L.R. 4 Q.B. 659; *Day v. Singleton*, [1899] 2 Ch. 320.

There seems, therefore, to be no reason for saying that such a case as the present is within the exception rather than within the general rule. It bears some analogy to the case of an action against an agent for selling without authority, in consequence of which the vendee obtains no title to the property: *Hughes v. Graeme* (1864), 12 W.R. 857; *Firbank's Executors v. Humphreys* (1886), 18 Q.B.D. 54; *In re National Coffee Palace Co.* (1883), 24 Ch. D. 367; *Meek v. Wendt* (1888), 21 Q.B.D. 126. No doubt the analogy is not complete, because the question of damages in such cases is the loss of the gain which the vendee would have derived from the contract which the defendant (the agent) warranted should be made, which may be less than the value of the thing sold, or the liability to or undertaken by the supposed vendor.

The judgment against the third parties, the MacWillie Company, must, therefore, stand for the full amount.

Moss, J. A. :—

Upon the argument of this appeal the propriety of the judgment in favour of the plaintiffs was not questioned, and the appeal, so far as it appeared to be directed against

the plaintiffs, was dismissed. Nor did the appellants, the MacWillie Company, seriously dispute their liability to the defendant Labatt except as to the amount of the damages.

The important question debated was that of the liability of the appellant Moore to indemnify the defendant Labatt against the judgment which the plaintiffs have been awarded against him. The defendant Labatt contends that Moore was the vendor of the elevator, motor, and connections, which Labatt purchased through his agent, and for the value of which the plaintiffs have recovered judgment against him. The learned trial Judge determined in favour of Labatt's contention. Upon a perusal and consideration of the evidence I find myself unable to agree with him.

[The learned Judge dealt with the evidence and continued:]

The appeal should be allowed as regards Moore, but dismissed with costs as against the MacWillie Company. I agree that as against the Company the amount of damages should, under the circumstances, stand as adjudged by the trial Judge.

MACLENNAN, and LISTER, JJ.A., concurred.

*Appeal allowed in part.*

R. S. C.

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Judgment.

MOSS, J.A.

WILSON V. OWEN SOUND PORTLAND CEMENT COMPANY,  
LIMITED.

*Master and Servant—Workmen's Compensation for Injuries Act—Defect in Machinery—Want of Notice of Accident—R.S.O. ch. 160, secs. 3 (1), 13, 14.*

A machine perfect in itself is, if applied to some purpose for which it is unfitted, defective within the meaning of section 3 (1) of the Workmen's Compensation for Injuries Act, R.S.O. ch. 160.

To state in the defence that notice of the accident has not been given, and that the defendants intend to rely on that defence, is not sufficient. Formal notice of the objection must be given in accordance with the provisions of section 14.

*Cavanagh v. Park* (1896), 23 A.R. 715, applied.

Owing to changes in legislation, *Hamilton v. Groesbeck* (1890), 19 O.R. 76, declared to be no longer an authority.

Judgment of FALCONBRIDGE, J., affirmed.

Statement.

APPEAL by the defendants from the judgment at the trial.

The following statement of the facts is taken from the judgment of LISTER, J.A. :—

The plaintiff sued to recover damages for an injury sustained by him while in the employment of the defendants, and caused, as it is alleged, by their negligence.

The defendants, by their statement of defence, (1) deny negligence; (2) plead contributory negligence; (3) knowledge on the part of the plaintiff of the alleged defect and failure to give notice thereof to them; and (4) failure to give notice of the injuries complained of, as required by sections 9 and 13 of "The Workmen's Compensation for Injuries Act," the words of the pleading on this point being: "The defendants further say that the plaintiff failed to give notice to the defendants of the injury complained of, as required by sections 9 and 13 of chapter 160 R.S.O. (1897), and the defendants rely upon this ground of defence, among others, and claim the benefit thereof and of the said Act."

Except by the pleading, no notice of intention to rely on the want of notice was given.

The action was tried before FALCONBRIDGE, J., and a jury. Statement.

At the close of the plaintiff's evidence, a motion on the part of the defendants to dismiss the action upon the ground, *inter alia*, that there was no evidence of negligence on their part which ought to be submitted to the jury, was refused. The learned Judge left questions to the jury, which with the answers thereto are as follows:—

1. Was the injury caused to the plaintiff by reason of any defect in the condition or arrangement of the ways, works, machinery, plant, buildings, or premises connected with the business of the defendants? Yes.

1 (A). If you find that there was such a defect, wherein did such defect consist? In not having a proper appliance in which to empty the bags of cement.

2. If a defect existed, could the plaintiff by the exercise of reasonable care have avoided the accident? We believe the plaintiff used all reasonable precaution.

3. If you find that there was a defect causing the injury, did the defect arise from, or had it not been discovered or remedied owing to the negligence of the defendants or of some person entrusted by them with the duty of seeing that the condition of the ways, etc., were proper? Yes.

4. If the plaintiff should be found entitled to recover, at what sum do you fix the compensation for his injuries? \$500.

Upon these findings the learned Judge directed judgment to be entered for the plaintiff for the damages assessed. The defendants appeal.

It appears from the evidence that the defendants at the time of the accident were engaged in the business of cement manufacturers, and among the machines used by them was one known as a "screw conveyer," which was used for the purpose of conveying or elevating to another part of the factory cement which was discharged into it,



Statement.

at a point about eighteen inches from its lowest end, from a drop spout connected with a conveyer in an upper part of the factory. The conveyer was formed of an iron screw about three feet four inches long, and from eight to eight and one-half inches in diameter, set in a wooden box six feet in length, ten inches wide, and thirteen inches deep, placed in a slanting position. The top of the box at one end was five and a half feet, and at the other end four feet and one inch, from the floor. The conveyer was connected with and operated by machinery in another part of the factory, and made, when being operated, from 78 to 80 revolutions per minute. When it was put up, and for several months thereafter, the box had a lid or cover in two sections, which was removed for the purpose, as it was said, of allowing a more convenient examination of the cement passing through the conveyer, and also in order to enable the defendants to use the machine as a "mixer," to mix the ordinary cement, passing from the spout, with a fine cement consisting of sweepings, and also fine particles of cement which were caught by fans and forced to a certain part of the factory used for the purpose. This fine cement was put into sacks of from sixteen to eighteen inches long, weighing when filled some sixty-five pounds each.

This cement was emptied from the sacks into the conveyer by a man standing alongside of and holding the sack over it, and allowing the cement to run slowly in order that it might become thoroughly mixed with the ordinary cement passing through the conveyer.

The plaintiff, who was a labourer, had been in the defendants' employment for some two months before the accident, and in obedience to the order and direction of the foreman (Lewis), proceeded to empty the sacks of cement into the conveyer. His evidence in respect of the orders received from Lewis was as follows :—

"How did you come to go to work at this conveyer? Well, the foreman, Mr. Lewis, took me there and told me what to do and how to do it.

Statement.

Tell us what he told you? He took me there and told me to empty those bags, the contents of them, into this elevator, one about every five minutes, and between times I was to shovel loose cement that was lying on the floor into this elevator.

This elevator, as you call it, is what they call the conveyer? Yes.

Mr. Lewis is the foreman there, is he? Yes.

Did he give you any particular instructions with reference to that work? No, he did not.

And did he caution you in any way with reference to the danger? No.

How high is the top of the wooden box or slide where you had to empty the cement into it? Five feet high."

The plaintiff, who was entirely inexperienced in such work, was standing alongside the conveyer in the performance of his duty, at a point where the top of the box was about five feet from the floor, where, as he testified, he had in presence of the foreman emptied the first sack, and his right hand dropped between the screw and the box, caused, as he said, by the screw catching the sack he was then emptying. His evidence of the manner in which the accident occurred was as follows:—

"Now, just tell me as near as you know how the accident did occur? Well, while I was emptying that sack, the sack choked; the cement in the sack stopped coming out, and I endeavoured to start it by moving the bag.

Shaking it? Yes; and in doing so lowered it, and the screw caught it, and the jerk when it caught caused me to kind of swing round, and my hand dropped between the side of the box and that screw."

The appeal was argued before MACLENNAN, MOSS, and LISTER, JJ.A., on the 20th of March, 1900.

*J. M. Kilbourn*, for the appellants. On the authority of *Cavanagh v. Park* (1896), 23 A.R. 715, the learned

Argument.

Judge overruled the objection of want of notice of the accident. But that case is distinguishable. There, there was merely a statement in the pleading that notice had not been given, while in this case the intention to rely on the objection is expressly stated, and service of a pleading in this form within proper time is a compliance with the Act. But on the merits the plaintiff fails. The machine was not defective, and the accident was the result of the plaintiff's carelessness.

*A. G. Mackay*, for the respondent. As far as want of notice is concerned, *Cavanagh v. Park* (1896), 23 A.R. 715, is an answer. Adding the words as to the reliance on the objection, can make no difference, for everything pleaded must be taken to be relied on. The machine was defective, having regard to the use to which it was being put, and the findings of the jury are conclusive.

*Kilbourn*, in reply.

May 15th, 1900. The judgment of the Court was delivered by

LISTER, J.A. :—

On the argument before us, it was contended that the evidence failed to establish that there was any "defect in the condition or arrangement of the machinery" within the meaning of section 3 (1) of "The Workmen's Compensation for Injuries Act." That sub-section is in these words: "Where personal injury is caused to a workman (1) By reason of any defect in the condition or arrangement of the ways, works, machinery, plant, buildings or premises connected with, intended for or used in the business of the employer," etc.

It is not denied that the machine was perfect in itself, safe and entirely suitable for the purpose for which it was constructed. The plaintiff, however, does not base his right to recover upon the ground that the machine was defective for the purpose for which it was designed, but

upon the ground that it was unsafe and unfit for the purpose to which it was being applied at the time of the accident, and therefore there was, as it is argued, a "defect in the condition or arrangement of the machinery" within the meaning of sub-section 1 of section 3 of the Act.

It is settled law that machinery, perfect in itself and intended for a particular work, is, when applied to some other purpose for which it is unfitted, defective within the meaning of the Act. In the leading case of *Heske v. Samuelson* (1883), 12 Q.B.D. 30, which arose under the corresponding section of the English Employers' Liability Act (1880), Lord Coleridge expressed the rule thus: "The question is whether the fact that the machine was unfit for the purpose for which it was applied constitutes a defect in its condition, within 43 & 44 Vict. ch. 42. The question really almost answers itself. If it was not in a proper condition for the purpose for which it was applied, there was a defect in its condition within the meaning of the Act." And Stephen, J., in the same case, said: "The condition of the machine must be a condition with relation to the purpose for which it is applied." See also *Cripps v. Judge* (1884), 13 Q.B.D. 583; *Paley v. Garnett* (1885), 16 Q.B.D., at p. 56; *Weblin v. Ballard* (1886), 17 Q.B.D., at p. 126; *Walsh v. Whiteley* (1888), 21 Q.B.D., at p. 379; *Morgan v. Hutchings* (1890), 59 L.J.Q.B. 197; *Stanton v. Scrutton* (1893), 62 L.J.Q.B. 405; *Tate v. Latham*, [1897] 1 Q.B.D. 502.

The evidence with respect to the fitness and safety of the machine for the purpose for which it was being applied at the time of the accident was conflicting. Witnesses for the plaintiff testified, as a matter of opinion, that in the absence of a hopper to receive the cement from the sacks, and a platform upon which the workman could stand while engaged in the work, the machine was unsafe and dangerous when used as a "mixer." On the other hand, witnesses for the defendants testified, also as a matter of opinion, that it was fit and proper for the purpose of being

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LISTER, J.A.



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LISTER, J.A.

used as a "mixer," and others that it was safe if the workman exercised proper care and caution, and that an accident necessarily meant negligence on his part. It clearly appeared, however, on the cross-examination of some of the defendants' witnesses, that sacks in the hands of experienced workmen had been caught and carried off by the screw, and that the defendants' foreman (Lewis) had knowledge of at least some of those accidents. Counsel for the defendants admitted that the machine had been constructed for the purpose of a conveyer, but with care might be used to receive cement from sacks.

The questions here are of fact, peculiarly for the jury, and their findings thereon can only be disturbed upon the ground that there was no evidence upon which they might reasonably find as they did. A full examination of the evidence has led me to the conclusion that there was evidence proper to be submitted to the jury; that it was fairly submitted, and is sufficient to support their findings. I can see no reason for interference.

In view of the judgment of this Court in *Cavanagh v. Park* (1896), 23 A.R. 715, it is not open to the defendants to argue that a plea setting up want of the notice required by sections 9 and 13 of the Act can be regarded as equivalent to the notice required by section 14 of the same Act.

Mr. Kilbourn, in citing the case of *Hamilton v. Groesbeck* (1890), 19 O.R. 76, evidently overlooked the fact that in the revision of 1897 of "The Ontario Factories Act" (R.S.O. ch. 256), the word "moving" in section 15, R.S.O. (1887), ch. 208, upon which the decision in that case turned, has been omitted. The case, therefore, can no longer be considered an authority, and as regards the other cases to which he has referred us, it seems to me they, in their facts, differ from those of the present case, and are, therefore, inapplicable.

I think the appeal ought to be dismissed with costs.

*Appeal dismissed.*

R. S. C.

## BOLLANDER V. CITY OF OTTAWA.

*Municipal Corporations — Market — Auctioneer — “Regulating and Governing” — R.S.O. ch. 223, ss. 580, 583 (2).*

Neither under section 580, nor under section 583 (2), of the Municipal Act, R.S.O. ch. 223, can the municipal council of a city prohibit an auctioneer from carrying on his business in the public markets of the city in respect of any commodities which may properly be sold there. Judgment of a Divisional Court, 30 O.R. 7, affirmed.

THIS was an appeal by the defendants from the judgment of a Divisional Court [ARMOUR, C.J., and STREET, J.], reported 30 O.R. 7, and was argued before BURTON, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, J.J.A., on the 14th of November, 1899. The facts are stated in the report below.

Statement.

*L. G. McCarthy*, for the appellants.

*G. F. Henderson*, for the respondent.

May 15th, 1900. The judgment of the Court was delivered by

OSLER, J.A.:—

The by-law in question is a by-law respecting public markets and weigh scales in the City of Ottawa, and section 21 thereof as amended and as now the object of attack enacts that no auctioneer, bailiff, crier or vendor of small wares shall practise his or her calling upon any of the public markets or in any of the public streets contiguous thereto or in any of the vacant lots adjoining any of such streets or in any buildings that shall have been allowed frontages on the public market squares.

The question is whether the defendant corporation had authority so to legislate with respect to auctioneers.

The statute law in force when the by-law was given its present form, viz., on the 18th of October, 1897, is to be

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found in several enactments now consolidated in the Municipal Act, R.S.O. ch. 223, sec. 583 (2), which may be conveniently referred to as that upon which the defendants mainly rely in support of the by-law.

In the case of *Merritt v. Toronto* (1895), 22 A.R. 205, this Court held that under the law as it formerly stood, which empowered the council to pass by-laws "for licensing, regulating and governing auctioneers and other persons selling or putting up for sale goods, wares, merchandise or effects by public auction," the council had no authority to refuse an auctioneer's license to a person deemed by them to be a person of bad character. Anyone was entitled to a license on payment of a reasonable fee, and the power of the council was confined to the making of reasonable provisions for the regulating and governing of persons so licensed. And in *Toronto v. Virgo*, [1896] A.C. 88, it was held by the Judicial Committee that a statutory power conferred upon a council to make by-laws for regulating and governing a trade does not in the absence of an express power of prohibition authorize a by-law to prohibit the carrying on of such trade (not being a nuisance) in an important part of the municipality.

After the question in *Merritt's* case had arisen, though before the actual decision thereof in this Court, the Legislature, by 57 Vict. ch. 50, sec. 8 (O.), amended the law by inserting in the original section after the words already quoted the following clause "and for prohibiting the granting of such license to any applicant who is not of good character, or whose premises are not suitable for the business, or upon residential or other streets in which in the opinion of the council it is not desirable that the business of auctioneer should be carried on, such disqualifications to be determined by such means as the by-law provides." The sub-section as consolidated ends with a provision of older date, 56 Vict. ch. 35, sec. 19 (O.), than the clause last quoted, viz., that no such by-law (as the sub-section provides for)

shall apply to a bailiff offering for sale goods seized as a distress for rent, and such bailiff shall not require any license for that purpose.

The plaintiff's license is earlier in date than the amended by-law, but it is expressed therein to be subject to the laws of the Province of Ontario and such by-laws, rules and regulations of the Corporation of the City of Ottawa as were then and which thereafter might be in force.

The objection to the by-law is that it absolutely prohibits and prevents the plaintiff from exercising his calling of auctioneer in the public markets.

He, no doubt, may not sell therein any commodities for the sale of which the markets were not established but the by-law goes further and prohibits him from exercising his calling in the markets by selling the articles for the sale of which they were established. It does not purport to be a by-law passed under the authority of section 583 (2) for licensing, regulating and governing auctioneers. It is a market by-law.

Nevertheless, if its enactments are within the authority of the sub-section it may be upheld. The language of that part of the sub-section secondly above quoted "and for prohibiting," etc., is principally directed to some personal disqualification of the applicant for the license, viz., his bad character or the unsuitableness of his own premises from their situation or otherwise for carrying on his business, but in other respects the council have a discretion to determine that he shall not be permitted to carry it on, on "residential or other streets" in which in their opinion it is not desirable that such a business should be carried on. This, however, is the limit of the power of the council to pass under this section any by-law of a prohibitory character and it does not extend to exclude the holder of a license from exercising his calling in the public market in respect of whatever commodities may by the law of the market be sold there. The by-law cannot, therefore, in my opinion be upheld under section 583 (2).

Judgment.

OSLER, J.A.



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OSLER, J.A.

The defendants also rely upon section 580, which relates to market by-laws. Sub-sections 2, 4, 5, and 6, were referred to on the argument. Some of these confer only the power of regulation in respect of the subjects with which they deal, and as to them I need say nothing further. Sub-section 6 permits the council to pass by-laws for preventing criers and vendors of small wares from practising their calling in the market place and public streets and vacant lots adjacent thereto, *i.e.*, adjacent to the market: *Toronto v. Virgo*, [1896] A.C. 88, at p. 92. I agree with the court below that the express power thus conferred upon the council to prohibit this class of persons from practising their calling in the market excludes the inference of any implied power to prevent other persons from doing so. Mr. McCarthy urged very strongly that the by-law might be supported under sub-section 5, which enables the corporation to pass by-laws for regulating the place and *manner* of selling grain and other articles exposed for sale, and this, he contended, conferred the power of preventing one mode or manner of selling, and so, of selling by auction.

This point we were told was not taken in the court below. I do not think that it is well taken now. The sub-section merely enables the council to regulate and govern any manner of selling by surrounding it with such restrictions or conditions as they may deem reasonable, but not to prevent it altogether as they by this by-law affect to do: *Toronto v. Virgo*, [1896] A.C. 88, at p. 93. Power to prevent as well as to regulate buying and selling is conferred by sub-sections 3, 4, and 7, in respect of the subjects dealt with, and this again repels the inference of the power to prevent which is contended for under sub-section 5.

I think, therefore, that the judgment should be affirmed and the appeal dismissed.

*Appeal dismissed.*

R. S. C.

## SNIDER V. MCKELVEY.

*Contract—Breach—Agreement not to practise medicine—Damages—Injunction.*

By an agreement under seal the defendant sold to the plaintiff a house and the goodwill of his medical practice for \$2100, and the defendant “(bound) himself in the sum of \$400, to be paid to the (plaintiff) in case the (defendant) shall set up or locate himself in the practice of medicine or surgery within the space of five years from the date hereof within a radius of five miles from the said village” :—

*Held*, that there was an implied agreement by the vendor not to resume practice; that the sum of \$400 was payable as liquidated damages on the breach of the agreement; and that the purchaser was entitled to that sum or to an injunction, but not to both.

Judgment of ROBERTSON, J., 31 O.R. 91, varied.

THIS was an appeal by the defendant from the judgment of ROBERTSON, J., reported 31 O.R. 91, and was argued before OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 26th and 27th of March, 1900. The facts, and the line of argument and authorities relied on, are stated in the report below and in the judgments in this Court.

*Garrow*, Q.C., for the appellant.

Statement.

*W. M. Sinclair*, for the respondent.

May 15th, 1900. OSLER, J.A.:—

The defendant is a medical man, who was, on the 7th of December, 1897, residing and practising his profession in the village of Brussels. He sold his property and practice and the goodwill thereof to the plaintiff for the consideration of \$2100 and entered into an agreement under seal binding himself “in the sum of \$400 to be paid to the party of the second part (plaintiff) in case the said party of the first part (defendant) shall set up or locate himself in the practice of medicine or surgery within the space of five years from the date hereof within a radius of five miles from the said village of Brussels.”

Subsequently the defendant engaged in the practice of medicine and surgery in Brussels and within a radius of five miles therefrom, and the plaintiff brought this action

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OSLER, J.A.

claiming damages and an injunction. Robertson, J., granted an injunction and awarded damages to the amount of \$100 for the defendant having so carried on his practice in breach of his agreement. The defendant's contention is that although the plaintiff may be entitled to an injunction with nominal damages (which he does not concede) or to payment of the \$400 (which he offers) he cannot have an injunction and substantial damages as well, whether \$400 or less.

The first question is whether from the language of the instrument an agreement not to practise can be inferred. The language is affirmative, to pay in case he practises, and unless an agreement not to practise can be inferred the plaintiff's only remedy is in damages. On this point, as well as on another which I must afterwards refer to, the case seems to me to be not unlike the case of *National Provincial Bank of England v. Marshall* (1888), 40 Ch. D. 112. There also the language of the instrument was in the affirmative. The condition was that the bond was to be void "if the obligor shall pay £1000 as liquidated damages in case the obligor at any time within two years after he shall have retired from any employment under the said bank . . . shall accept any employment . . . in or for any bank within 20 miles of the said bank."

The Court held that an agreement was to be implied from the language of the bond that the defendant could not enter into the employment of a rival bank. Here the contract recites the defendant's agreement to sell to the plaintiff his medical practice, together with the goodwill of the medical practice, and I think that (as in the case cited) an agreement is to be inferred from the contract as a whole that the defendant will not resume or continue that practice, the effect of doing which would be to destroy the goodwill which he had sold. It is, therefore, an agreement of which the Court will enforce the performance and not one which gives the defendant the option to purchase liberty to resume his practice, or to set up in practice, on

payment of the sum specified: *French v. Macale* (1842), 2 Dr. & W. 269; Fry on Specific Performance, 3rd ed., sec. 142. And whether that sum is to be regarded as liquidated damages or as a penalty strictly so called, the jurisdiction of the Court to compel the defendant to observe his agreement is the same: Fry, 3rd ed., sec. 146; *Howard v. Woodward* (1864), 10 Jur. N.S. 1123.

The plaintiff insists that it is a penalty, and if a penalty, that he may have damages assessed for breach of the condition as well as the injunction to restrain further breaches.

I do not see how there can be any such distinction as the plaintiff relies upon between the case of a bond with a penalty, and an agreement to pay liquidated damages, where the plaintiff seeks the assistance of the Court to compel a party to adhere to the agreement, default in the performance of which gives rise to the action for the penalty or the liquidated damages, because whether he sues upon the bond and has his damages assessed, or recovers the sum specified as liquidated damages, he would, if the equitable remedy by injunction were also enforced, be obtaining performance of the agreement in specie and also what he was only to be entitled to recover in the case of its non-performance.

The learned trial Judge does not seem to have expressly decided the point, but I am of opinion, looking at the scope and object of the agreement, that the \$400 was intended to be payable as liquidated damages.

The sale was of the defendant's medical practice and goodwill together with his lands and premises in the village of Brussels for a single consideration, and the agreement contains the stipulation which, as Sir Geo. Jessel, M.R., observes in *May v. Thomson* (1882), 20 Ch.D. 705, 718, is usual in cases of sales of a medical practice, that the selling doctor shall retire from practice within a given distance and for a certain time.

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OSLER, J.A.

In agreements for the sale of a business containing covenants against carrying on a similar business within certain limits on the breach of which a certain sum is to be paid, this sum has frequently been held to be recoverable in full as being liquidated damages, on the principle that it was stipulated to be paid on the breach of a condition of uncertain value : Leake on Contracts, 3rd ed., p. 940; 2 White and Tudor, L.C., 7th ed., p. 267.

Here the single event provided for in which the money is to be paid is, if the defendant shall set up or locate himself in the practice of medicine or surgery within the space and time limited. The plaintiff's whole object was to protect himself from the rivalry of the defendant, whose practice he had just bought for a large sum, and the destruction of the goodwill by the vendor's continuance in, or resumption of, practice in the neighbourhood. It would be difficult, nay, almost impossible, to determine what damage might result from the breach of the agreement, there being no adequate means of ascertaining what patients he might have visited or what fees he might have received, and it would be reasonable, therefore, that the parties should agree beforehand on a sum which should be paid in the event of a breach: *Sainter v. Ferguson* (1849), 7 C.B. 716; 1 Mac. & G. 286; *Carnes v. Nesbitt* (1862), 7 H. & N. 778; *Howard v. Woodward* (1864), 10 Jur. N.S. 1123. But the plaintiff is, as I have intimated, confined to one of his remedies.

*Fox v. Scard* (1863), 33 Beav. 327, was the case of a bond given by a surgeon not to practise at a certain place. The plaintiff filed his bill to restrain the defendant from practising there in breach of his agreement, and by the bill offered to waive the penalty of the bond. The defendant contended that the plaintiff's only remedy was at law for the pecuniary damages agreed upon. The Master of the Rolls said: "Where a person enters into an agreement not to do a particular act, and gives his bond to another to secure it, the latter has a right at law and equity, and

can obtain relief in either, but not in both, courts. If he proceeds at law on the bond and recovers damages, and afterwards comes into equity, and states that fact in his bill, a demurrer will lie, because he has chosen the jurisdiction and the remedy he will have. . . It sometimes happens that this legal right is in doubt, and, in such cases, the Court used formerly to direct an action to try the right. This is now prevented by Mr. Rolt's Act, which compels the Court to determine the legal right. But the practice under the old system is a good illustration. When the Court gave liberty to the plaintiff to try his right in an action, if he succeeded and only took nominal damages, he obtained his equitable relief; but if he sought and obtained substantial damages, the Court, when he came back, dismissed his bill, saying, 'You have already had your remedy at law.' But the plaintiff has a right to say, 'I will not have money or take compensation in damages, but I will have the strict performance of that which is secured to me by the bond,' which, in this case, is in the nature of a covenant by the defendant that he will not practise at Weymouth. The bill contains a paragraph waiving the penalties of the bond, but, without that, if, after an injunction had been granted against the defendant, the plaintiff should bring an action for damages, the defendant might come here and have the injunction dissolved."

*Howard v. Woodward* (1864), 10 Jur. N.S. 1123, is a case of similar character between two solicitors; and *per Wood*, V.C.: "The order will be that, the plaintiff undertaking not to sue on the bond, the injunction be granted as prayed."

*Gravelly v. Barnard* (1874), L.R. 18 Eq. 518, is another case between two surgeons, the plaintiff seeking to restrain the defendant from practising in breach of the condition of his bond. The plaintiff waived by his bill all penalties recoverable at law upon the bond.

*National Provincial Bank of England v. Marshall* (1888), 40 Ch.D. 112, was an action by bankers

Judgment.

OSLER, J.A.

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OSLER, J.A.

against their clerk to restrain him from entering into the employment of a rival bank contrary to the condition of his bond. The Court held that the sum mentioned in the bond to be paid on breach of the condition was payable as liquidated damages, and might have been recovered as such without proof of actual damage, but that the plaintiffs had the alternative right to invoke the assistance of the Court to enforce the agreement to be implied from the bond not to accept employment with another bank. Cotton, L.J., says: "It is true that in most cases there has been a recital in the bond or some other evidence from which the Court has found that there was an agreement between the parties, and in such cases it has been held that if the obligee brings an action he can recover damages, but if he comes into a Court of Equity the agreement will be enforced if no action for damages has been brought, and an injunction will be granted." And *per* Lindley, L.J.: "The plaintiffs have an alternative remedy to enforce the agreement if they do not bring an action."

I have referred, perhaps at needless length, to cases decided after the passage of Lord Cairns' Act, 21-22 Vict. ch. 27, to shew that it does not seem to have occurred to anyone until it was suggested in the present case that the power conferred upon the Court of Chancery by that Act (now exercised under the Judicature Act) would warrant the giving of damages in addition to an injunction in an action like the present. It is clear that the Act did not enable the Court to give the plaintiff a double remedy where before the Act his right was in the alternative—either at law or in equity, but not in both: *Saintier v. Ferguson* (1849), 7 C.B. 716; 1 Mac. & G. 286.

The learned trial Judge relied upon the case of *Mossop v. Mason* (1869), 16 Gr. 302, (1870) 17 Gr. 360, (1871) 18 Gr. 453 (in appeal), where damages were awarded as well as an injunction. But that case is quite distinguishable. There the defendant had sold to the plaintiff *inter alia* the goodwill of the business of an innkeeper carried on by him, and

the bill was filed to restrain him from resuming the business he had sold and for damages sustained in consequence of his having done so. There was, as the Court held, no valid covenant or bond for the breach of which the plaintiff could have sued at law. The plaintiff had, therefore, no alternative remedy, and his right to recover rested solely upon the defendant's equitable obligation, implied in the sale of the goodwill, not to hold out in any way that he was carrying on business in continuation of, or in succession to, the business formerly carried on by him, the goodwill of which he had sold. See *Labouchere v. Dawson*, (1872), L.R. 13 Eq. 322; approved in *Trego v. Hunt*, [1896] A.C. 7.

There was, therefore, nothing to prevent the Court from directing a reference to ascertain what damages the plaintiff had sustained consequent upon the breach of the equitable obligation.

In my opinion the plaintiff must elect whether he will take judgment for the \$400 or for the injunction, and if he elects the latter the judgment below must be varied by striking out so much thereof as relates to the damages.

The plaintiff must bear the costs of this appeal.

MACLENNAN, J.A.:—

I think it is not necessary to determine whether, in the case of a mere penalty, a plaintiff complaining of a breach of an agreement may have both damages and an injunction or not, for I think the \$400 mentioned in this agreement is clearly liquidated damages. It is clearly settled that in a case of liquidated damages the plaintiff must elect between the damages and an injunction. Where the parties stipulate for a fixed sum for damages for any and every possible breach of the contract, and when the plaintiff has recovered that sum, the contract is exhausted. But it is not easy to see why, where there may be a succession of breaches of contract, and a succession of recoveries, so

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 J.A.

as they do not in the aggregate exceed the penalty, there may not be a recovery of damages for one or more breaches, and an injunction to restrain subsequent breaches, just as there may be a recovery of damages for a tort or trespass, and an injunction to restrain its continuance: *Imperial Gas Light and Coke Co. v. Broadbent*, (1859), 7 H.L.C. at p. 612. It would be an intolerable state of the law if one were to enter upon the land of another and cut down a large quantity of timber before the trespass was discovered, and that the owner could not have both an injunction and damages; or, if a tenant were to commit great waste, that he could not be restrained from its continuance by his landlord, without abandoning all claim for damages.

The cases cited by my brother Osler, however, shew that in a case of liquidated damages, such as the present, the plaintiff must elect; and the judgment must be varied accordingly.

MOSS, and LISTER, JJ.A., concurred.

*Appeal allowed in part.*

R. S. C.

# ONTARIO LANTERN COMPANY V. HAMILTON BRASS MANUFACTURING COMPANY (LIMITED).

*Contract—Manufacture and Sale of Chattels—Breach—Damages.*

Five days after making a contract with the plaintiffs for the manufacture by them of a large number of shells for electric light lamps, to be delivered monthly for a period of twenty months, the defendants notified the plaintiffs that they would not carry out the contract. The plaintiffs had done nothing towards performing the contract, and had incurred no expense with reference to it:—

*Held*, that though the plaintiffs were entitled to bring an action at once to recover damages, they should not be allowed as damages the full amount of their expected profit, but that allowance should be made for the many contingencies which might have happened before the time for fulfilment.

The Court, after stating the general principles and pointing out some of the contingencies, reduced the amount of damages allowed by MEREDITH, C.J.

Statement.

APPEAL by the defendants from the judgment at the trial before Meredith, C.J.

Statement..

The action was brought to recover damages for breach of a contract for the purchase of shells for electric light lamps, to be manufactured by the plaintiffs for the defendants. The only question of general interest was as to the quantum of damages, and the facts and contentions of the parties in reference to this point are stated in the judgment.

The appeal was argued before OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 30th of March, 1900.

*Lynch-Staunton*, Q.C., for the appellants.

*D'Arcy Tate*, for the respondents.

May 15th, 1900. The judgment of the Court was delivered by

OSLER, J.A. :—

I cannot agree with the defendants' contention that no memorandum in writing of the bargain was proved sufficient to satisfy the statute. There is the order signed by them addressed to the plaintiffs, which specifies the articles to be manufactured and the price. The order was accepted and agreed to by parol but that, as the law now stands, is sufficient: *Reuss v. Picksley* (1866), L.R. 1 Ex. 342; *In re New Eberhardt Co.* (1889), 43 Ch. D. 118, 127; *Beresford v. Batthyany* (1882), W.N. 84, 171.

Had the plaintiffs' testimony been the only proof offered of the parol acceptance, it would have been unsafe to act upon it contradicted as it is by the defendants, but I think the former is to some extent corroborated by the defendants' letter of the 8th of March, 1899, in which they request the plaintiffs to "cancel our order," and offer to pay any expenses the plaintiffs have been put to. Had there been no completed contract the plaintiffs would have been under no obligation to incur

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any expense and the defendants' offer to pay betrays a consciousness that they were legally in the wrong. It was not argued either at the trial or before us that if there was a contract the defendants had not repudiated it and announced to the plaintiffs their intention of not being bound by it. The case was tried throughout on that assumption, and we must now take it that it stands in that situation. It is indeed only necessary to refer to the evidence of the defendant's manager at the trial where he distinctly says that they did cancel and refuse to be bound by the contract.

The only contention at the trial, apart from the question whether there really was any contract at all between the parties, was as to the damages, and it was argued before us on the same lines.

The contract, which was made on the 3rd of March, 1899, was for the manufacture of articles used in connection with electric lighting, known as Edison shells and T. & H. shells, 100,000 of each kind, and for monthly deliveries, extending over a period of twenty months. Within five days after it was made the defendants intimated their intention not to perform it. The plaintiffs, while not assenting thereto, adopted and accepted the repudiation, and on the 26th of April, 1899, brought this action.

Nothing had been done, and no expense incurred, by the plaintiffs towards performance of the contract. One of them indeed said that they had "placed an order" for two tons of brass on account of it, but this was not delivered and the order was changed, apparently to the plaintiffs' advantage, for brass of a different quality which they required in their business.

The plaintiffs testified that their profit on the contract would have been \$1900. Two witnesses named Chadwick thought it would be about \$1500. I think they were speaking at large.

A practical witness for the defendants gave figures from which I infer that he thought it would not exceed \$700 or thereabouts.

On the argument of the appeal the plaintiffs contended that there was no market for such articles, but I do not see that any evidence was offered on this point except the statement that this was a special kind of shell, and one witness seems to have been about to say, when interrupted, that there was an American market for them. It was said that the defendants had "placed an order" with the Chadwicks for the same articles two days after they had cancelled the plaintiffs' order, at \$500 less than the latter, but that this had also been cancelled. The evidence as to this is somewhat indefinite, and I think falls short of proving that any real contract had been made.

There was reason to suppose that if the plaintiffs had proceeded to execute their contract they must have given up some of their ordinary business, of which they had as much as they could handle. This is all the evidence that I have been able to find bearing on the question of damages.

The defendants argued that the plaintiffs could sue only in respect of the non-delivery of the first monthly instalment, as that was the only one in default when they commenced their action. The learned trial Judge, while not agreeing with this contention, assessed the damages, contingently upon its being upheld in this Court, at \$50, and in that event directed judgment for that sum with full costs. Of this the defendants complain, and I think their objection is well taken. This Court would, I am sure, pay great deference to the trial Judge's view of an alternative or contingent assessment, but a judgment reversing the judgment actually pronounced at the trial and directing a different judgment to be entered, proceeds upon the direction of this Court, and it would be for this Court, and not for the trial Judge, in that event to deal with the costs of the action. But I agree with the

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learned trial Judge that the plaintiffs had the right to sue as for a breach of the entire contract, and to have their damages assessed once for all.

If there was, as I think we must at this stage of the case hold, a clear renunciation and repudiation of the defendants' contract, and an announcement to the plaintiffs of their intention not to perform it, the plaintiffs are entitled to take, as they have taken, one of the courses mentioned in the judgment of Cockburn, C.J., in *Frost v. Knight* (1872), L.R. 7 Ex. 111, viz.: "The promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss."

And see *per* Lord Esher, M.R., in *Johnstone v. Milling* (1886), 16 Q.B.D. 460.

The cases of *Brown v. Muller* (1872), L.R. 7 Ex. 319; and *Roper v. Johnson* (1873), L.R. 8 C.P. 167, decide: 1st. that the foregoing rule applies to the case of a contract, such as we are here concerned with, for the delivery of goods in equal proportions during a given number of months; 2nd. that the proper measure of damages in such case is the sum of the differences between the contract price and the market prices on the last day of each month respectively,—following the rule established in the older cases of *Boorman v. Nash* (1829), 9 B. & C. 145, and *Josling v. Irvine* (1861), 6 H. & N. 512; and, 3rd. that when the action on such a contract is brought and tried before the expiration of the time at which the last delivery should have taken place, the rule last mentioned is to be applied *cy pres*, or as nearly as may be. In *Roper v. Johnson*, where this last proposition was laid down, there was practically no difficulty in acting upon it,

as the action was tried in the middle of the last contract month, and the evidence was that the price of iron had been steadily advancing, and that there would probably be a further advance during the succeeding fortnight of 10% per ton.

*Simpson v. Crippin* (1872), L.R. 8 Q.B. 14, was a case in principle like *Roper v. Johnson*, the action having been brought at the end of the 6th month on a contract which called for 12 monthly deliveries. Substantial damages were given by the jury though very much less than the plaintiff claimed, but beyond this the case is of no special value as it does not appear that there was any discussion upon the damage point.

The ordinary rule as to the measure of damages in the case of a breach of contract to accept a manufactured article applies, it has been said, equally in the case of an unmanufactured article. Each case must, of course, depend upon its own circumstances, but it is clearly settled that the manufacturer is not bound to manufacture and tender the article if there is a refusal by the purchaser to perform his contract, which amounts to a practical dispensation or discharge of the vendor-manufacturer from doing so.

In *Cort v. Ambergate etc. R. W. Co.* (1851), 17 Q.B. 127, the head note states the point: "On a contract for the manufacturing and supply of goods from time to time, to be paid for after delivery, if the purchaser, having accepted and paid for a portion of the goods, gives notice to the vendor not to manufacture any more as the purchaser has no occasion for them and will not accept or pay for them, the vendor having been desirous and able to complete the supply, such vendor may, without manufacturing and tendering the rest of the goods, maintain an action against the purchaser for breach of the contract."

In that case the contract was for the supply of 3900 tons of iron railway chairs deliverable from time to time. The plaintiffs delivered 1787 tons, when the defendants refused to accept or pay for any more and gave notice to

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the plaintiffs not to manufacture any more. It appeared that the plaintiffs had bought premises necessary for carrying out so large a contract; had made contracts for iron, and at considerable expense and by incurring various liabilities, had put themselves in a situation to supply the whole quantity of chairs ordered, and a quantity remained on their hands ready to be delivered. It was held that the jury were properly directed to give such damages as would leave the plaintiffs in the same situation as if they had performed their contract. The jury gave substantial damages, which the evidence plainly called for, though whether up to the full contract price or not does not appear.

*Silverstone &c., Coal and Iron Co. v. Joint Stock Coal Co.* (1877), 35 L.T.N.S. 668, was an action to recover damages from the defendants for breach of contract in failing to take a full monthly quantity of coal under a contract whereby the plaintiffs, who were colliery owners, had contracted to supply, and the defendants to purchase, 3250 tons at 19/ per ton to be delivered to and taken by the defendants at the pit's mouth in equal monthly quantities extending over 9 months. The coal was of a perishable nature and could not readily or profitably be disposed of in the market except occasionally and in small quantities. There was, therefore, practically no market, and it was held that the plaintiffs were not bound to have raised and sold the coal or to have tried to make other forward contracts, and that the damages they were entitled to recover was the difference between the cost of raising the coal, added to the value of the coal itself remaining unraised in the mine, and the contract price of 19/ per ton. To ascertain this a reference was directed. See also the *Dunkirk Colliery Co. v. Lever* (1878), 9 Ch. D. 20, 25.

*Tredegar Iron and Coal Co. v. Gielgud* (1883), Cab. & Ell. 27, is the only other case I will refer to. That was an action by the vendors for breach of a contract under which they were to manufacture and deliver 4700 tons of iron

rails at £5.7.6 per ton for American shipment. The purchaser had agreed to furnish a banker's credit for the price which he failed to do and the action was brought before the plaintiffs had manufactured any rails at all. They offered evidence that there would have been a clear profit earned of £2069 if the contract had been carried through and that they had sustained a loss of £2748 in consequence of their works lying idle for a long time. It was also proved that the demand for iron rails had ceased about a month after the date of the contract. The plaintiffs had been unable to obtain an offer for the rails to be manufactured at £5 per ton, and it was admitted that the contract could not have been sold against the buyer. The plaintiffs could possibly have obtained orders in England for lots of 400 or 500 tons but at what price or in what quantity in the whole was not proved.

Field, J., by whom the case was tried without a jury, said that the ordinary rule was that the plaintiffs were entitled to the difference between the contract price and the market price at the date of the breach, and he could not find that it made any difference whether for a manufactured or for an unmanufactured article. If there was no market it was settled that some other means of estimating the damage must be resorted to. The defendants had called no evidence to shew that there was a market, but there was evidence which showed that the price had gone down. He said that he must assess the damages upon the evidence before him as a jurymen, and not being satisfied that 7/6 per ton represented the actual loss, he gave judgment for the plaintiffs for £1100.

The result of these cases seems to be that while there are general principles on which the damages are to be estimated for the breach of contracts of this nature, yet there is, nevertheless, a considerable degree of elasticity in their application, whether the damages are assessed by a jury or by a judge; and where the evidence does not admit of their being assessed with precise accuracy, or,

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as it were, in moneys numbered, they are, within certain limits, left somewhat at large. The learned trial Judge in this case assessed the damages on the evidence as a juryman, as Field, J., did in the case last cited, and declined to give his reasons. It may be that it was in his discretion to take that course—see *per* Bramwell, L.J., in *Dunkirk Colliery Co. v. Lever* (1878), 9 Ch. D. 20, 28—and I make no observation upon it further than to say that this Court is necessarily less embarrassed in dealing with the case than it otherwise might have been. My own view of the evidence is that the plaintiffs have been too liberally dealt with. Suing, as no doubt they had a right to do, immediately upon the defendants' repudiation of the contract, and when, therefore, it would be almost impossible to apply accurately the general rules laid down in the cases cited for ascertaining their damage, it was certainly incumbent upon them to prove with reasonable distinctness in some other manner the damage they had really sustained by the breach of the defendants' contract. It may not be unreasonable to infer, considering the special nature of the articles to be manufactured, that there was no fair market where they could have been taken and sold from month to month, as wheat or flour or lumber might be. On the other hand, it is very easy, as one of the witnesses said, to figure out profits upon paper, but many contingencies and conditions might arise which would interfere with their realization, especially in the case of a contract the performance of which might extend, and I think was intended by both parties to extend, over a period of nearly two years. It cannot be overlooked that the plaintiffs had done nothing towards performing it, and had incurred no expense, and that there was some probability that the only effect of the rejection of the contract was to leave the plaintiffs free to perform their ordinary business; in other words that they could not have carried it out without going to a much greater expense than they were making allowance

for. I have felt some doubt whether the plaintiffs have proved any substantial damage, but on the whole I think we may allow that they have probably sustained some loss. I think that full justice would be done by an allowance of \$250, to which amount I would reduce the judgment. The appeal should, therefore, be allowed to this extent. I think the plaintiffs should have costs of the action upon the High Court scale, and under all the circumstances there should be no costs of the appeal to either party.

Judgment.

OSLER, J. A.

*Appeal allowed in part.*

R. S. C.

# IN RE McLELLAN AND TOWNSHIP OF CHINGUACOUSY.

## *Ditches and Watercourses Act—Municipal Corporations—Compensation.*

A municipal corporation is an "owner," within the meaning of the Ditches and Watercourses Act in respect of highways under its jurisdiction, and as such may initiate proceedings under that Act.

Where it has, pursuant to an award in proceedings initiated by it under that Act, constructed, without negligence, a drain from a highway to a river through an adjoining owner's land, it is not liable to make compensation under the Municipal Act to that adjoining proprietor in case his land has been injuriously affected by the drain.

Judgment of the Official Arbitrator reversed.

APPEAL by the Township from the award of the Official Arbitrator.

Statement.

The short point involved was whether the Township was liable to make compensation to a landowner through whose land a drain had been made, pursuant to an award in proceedings initiated by the Township under the Ditches and Watercourses Act, to carry water from a highway under the Township's jurisdiction. The landowner contended that the drain "injuriously affected" his land, and the Official Arbitrator awarded him compensation.

The appeal was argued before MACLENNAN, MOSS, and LISTER, JJ.A., on the 21st of March, 1900.

Argument.

*Shepley, Q.C., and A. McKechnie*, for the appellants. The respondent is bound by the award under the Ditches and Watercourses Act, and must obtain relief, if at all, under that Act: *Seymour v. Maidstone* (1897), 24 A.R. 370. If the appellants are not protected by the Ditches and Watercourses Act they are trespassers and the respondent cannot proceed against them by arbitration. In either view the award appealed against is bad.

*T. J. Blain, and D. O. Cameron*, for the respondents. The respondents were not entitled to proceed under the Ditches and Watercourses Act, and the award under that Act is no protection to them: *Riddell v. McKay* (1877), 13 C.L.J. 92. If they are trespassers the respondent may sue, it is true, but he is not bound to do so. He may, if he wish, treat them as lawfully in possession and proceed by way of arbitration. Even if the proceedings under the Ditches and Watercourses Act are held to be good, there is liability under sec. 437 of the Municipal Act, R.S.O. ch. 223, to make compensation. Here the municipality did not take proceedings as owners of land in the strict sense, but merely as owners in the statutory sense of having jurisdiction over the highway. In such a case they may fairly be held liable to make compensation, though the case might be different if they, like any other owner of land, were taking proceedings under the Ditches and Watercourses Act in respect of land actually owned by them.

*Shepley*, in reply.

May 15th, 1900. MACLENNAN, J.A.:—

This is an appeal from an award made by the Official Arbitrator in favour of the plaintiff for \$250 damages to his land, alleged to have been caused by the defendants by the construction of a ditch. The plaintiff had set the arbitrator in motion under the provisions of the Municipal Arbitration Act, R.S.O. ch. 227, and it was objected before him that he had no jurisdiction, inasmuch as the acts of the defendants which were complained of were done under

the Ditches and Watercourses Act, and that the defendants were not liable therefor. The Official Arbitrator overruled the objection and proceeded with the arbitration and made the award complained of, holding that the Ditches and Watercourses Act was inapplicable to such a case, and that the plaintiff was entitled to compensation under sec. 437 of the Municipal Act as for land injuriously affected by the exercise of its powers by the defendant municipality.

It is not disputed that the defendants assumed to act under the Ditches and Watercourses Act, and took the several steps prescribed by that Act, and did what they did in pursuance of the award of the engineer as usual in such cases.

I am quite unable to appreciate the reasons given for holding that the Ditches and Watercourses Act was inapplicable to such a case. It is clear from sec. 3 of this Act that a municipality, in respect of roads within its jurisdiction, is an owner within the Act, and may initiate proceedings under it; and from sec. 7 that it may do so without filing the declaration of ownership required from other owners. If the plaintiff had any objection to the engineer's award he could have appealed against it, but he did not do so, and allowed the work to be done by the defendants. He took the chances of benefit to his land, by the work which the engineer had ordered the defendants to do, and he has himself to blame if the result is injurious, instead of being beneficial to him. I think it too clear for argument, that there can be no claim for compensation, under the Municipal Act, for work done by a municipal corporation in pursuance of an award under the Ditches and Watercourses Act. The appeal must, therefore, be allowed and the award must be set aside.

Moss, J.A.:—

The claim for compensation in respect of which the award now appealed against was made is thus stated in

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the respondent's notice: "I claim compensation for damages sustained by me by the work done by the said municipal corporation injuriously affecting my lands. . . . The said work was done by the said corporation upon the award of A. J. Vannostrand, which said award is dated the 4th day of June, 1898."

The award when produced proved to be an award made by Vannostrand acting as an engineer under the provisions of the Ditches and Watercourses Act.

It was admitted before the Official Arbitrator by the respondent's counsel that all the preliminary steps necessary to lead to an award under that Act had been properly taken, that the engineer had his view, and made the award of which the respondent had notice, that the respondent might have taken an appeal to the County Judge as to whether this was a proper award or not but did not avail himself of the right for certain reasons stated in the notes of the preliminary discussion before the Official Arbitrator.

The proceedings resulting in the award were initiated by the appellants with the object of providing a ditch for drainage of a portion of the allowance for road known as Hurontario Street, within the territorial jurisdiction of the appellants' municipality. The award directed the opening of a ditch from a point on the western limit of the road allowance for a distance of about 188 feet through the respondent's lands to the River Etobicoke, the location, description, and course of the ditch and its points of commencement and termination being fully described in the award and delineated on a plan annexed thereto. It further directed that all the necessary work required to be done for the construction of the ditch should be done by the appellants and at their sole expense, and further that they should maintain it in the future.

The appellants thereafter constructed the ditch in accordance with the directions of the award, and the Official Arbitrator states that he cannot find that it was negligently constructed. The damage for which compensa-

tion was claimed and has been awarded has been found to result not from any negligence in the performance of the directions of the award, for they were strictly observed, but from the placing of the ditch where it was placed in relation to the respondent's lands. This the Official Arbitrator says, "necessarily resulted in damage to the claimant's [respondent's] lands by bringing in the water as described and discharging the same thereon, thereby causing the washing away of the soil and the flooding complained of." That the respondent's lands have suffered some damage from causes probably not fully foreseen by the engineer when making his award seems apparent.

But it does not follow that the respondent is entitled to compel the appellants to make him compensation for such damage.

The fact that the ditch was constructed under the award and that the award has not been appealed from or set aside presents a formidable obstacle to the respondent's claim.

The Official Arbitrator presents some very strong reasons against the propriety of applying the provisions and machinery of the Ditches and Watercourses Act to the case of a ditch only required to perform the office for which the ditch in question was required.

But if the Ditches and Watercourses Act enables a municipality to invoke its provisions and to initiate proceedings under it in respect of highways under its jurisdiction, then these arguments should have been addressed to the County Judge upon an appeal from the award.

That a municipality is an owner as regards highways under its jurisdiction is declared by sec. 3 of the Act, and that it may commence proceedings seems to follow from the language of sec. 7, that any owner other than the municipality shall before commencing proceedings under the Act file a declaration of ownership.

This being so, and the appellants having taken all the other proper steps to lead to an award, the engineer had

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jurisdiction to deal with the matter and make an award, and the only remedy of an owner party to the proceedings dissatisfied with the award was an appeal to the County Judge under sec. 22. That section confers upon the County Judge the amplest powers to set aside, alter, or affirm the award and correct any errors therein. But if the award be not appealed from, or being appealed from is not set aside, it is valid and binding to all intents and purposes: sec. 24.

The award in question was not appealed from and cannot be disregarded, nor with it standing, and in the face of the whole evidence, can it be assumed that the work of constructing the ditch was done by the appellants in the exercise of its general municipal powers.

The Official Arbitrator suggests that it might be properly assumed that the appellants were proceeding under sec. 640 of the Municipal Act. But even if the award could be put aside I do not think sec. 640 of the Municipal Act would apply to this ditch. Sec. 554, which the appellants' counsel suggested as probably more applicable, was, until the recent amendment, confined to counties, cities, towns and villages.

On the whole I think the respondent's remedy must be a reconsideration of the award or some other proceeding under the Ditches and Watercourses Act. He does appear to be suffering some hardship from the actual operation of the ditch, and I think with the Official Arbitrator that there ought to be a mutual effort to adjust the matter in such wise as to prevent this in the future.

The appeal must be allowed and the award set aside with costs.

LISTER, J.A. :—

This is an appeal by the contestants from the award of James Proctor, Esquire, Official Arbitrator, whereby he adjudged and awarded that the appellants should pay to the respondent the sum of \$250.00 "in full satisfaction of all claims for compensation for entering upon, taking,

using and injuriously affecting the said lands of the claimant by reason of the construction of the ditch complained of."

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The ditch or drain was constructed by the appellants without negligence in and from a highway under their jurisdiction through and across the lands of the respondent under the authority of an award made by an engineer appointed by them in compliance with section 4 (1) of the Ditches and Watercourses Act, and pursuant to the provisions of that Act, and on their requisition.

The drain was designed to convey the water from the highway situate on the east side of the respondent's lands to the River Etobicoke on the west side thereof.

By the terms of the award the appellants were required at their own cost to construct and maintain the drain. The respondent having made a claim on the appellants for compensation for damages resulting from the construction of the drain in respect of which they denied all liability, the respondent took proceedings under the arbitration clauses of the Municipal Act for the enforcement of such claim, which resulted in the award now appealed from.

That the appellants are, under the Ditches and Watercourses Act, as regards the highways under their jurisdiction, placed in precisely the same position as an individual owner does not, as it seems to me, admit of serious argument. Section 3 declares that "'owner' shall mean and include an owner, the executor or executors of an owner . . . and a municipal corporation as regards any highway under its jurisdiction," and section 7 requires that any owner other than the *municipality* before commencing proceedings under the Act shall file with the clerk of the municipality a declaration of ownership in the form therein prescribed. What the Act does is to confer on a municipal council the same rights and impose the same liabilities as are conferred and imposed on an individual owner. The appellants being an "owner"



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LISTER, J.A.

within the meaning of the Act were clearly within their rights in invoking its provisions in respect of the drain complained of. It is to be observed that while the Act authorizes the construction of a drainage work it imposes no liability for the payment of compensation for damages resulting from the work. Such a claim, therefore, can be neither the subject of an action nor of compensation unless indeed some other Act can be applied.

For the respondent it is said that although the work was in fact done under the authority of the Ditches and Watercourses Act, it must nevertheless be regarded as having been done by the appellants in the exercise of their powers within the meaning of section 437 of the Municipal Act, and therefore they are liable for compensation for damages resulting from its execution. I do not think this contention well founded. It appears to me that section 437 clearly contemplates a liability arising from an act which the municipal council upon its own motion could lawfully undertake and execute, and not to a case where the work causing the damage was done under and in *obedience* to a valid award made by an engineer pursuant to the provisions of the Ditches and Watercourses Act, the performance of which could, under that Act, be enforced without reference to the wishes of the council.

While it is true the award was made by an engineer appointed by the appellants, it must be borne in mind that the Act requires the municipal council to appoint such an officer and that when appointed, it, and not the council prescribes his duties. The council have no control over his proceedings and are bound to the same extent as an individual owner to carry out and perform a valid award made by him under its provisions.

Obviously the Act was intended to apply to a small and inexpensive class of drains and not to such drainage works as are contemplated by the Municipal Drainage Act.

It, as before remarked, creates no liability for compensation or damages for lands entered upon, taken, used for, or resulting from, a work authorized by a valid award made under its provisions. The rights and liabilities of the parties to such an award for or in respect of anything lawfully done under it, must be enforced and worked out under the provisions of the Act.

I entirely agree with the observations of the late Mr. Justice John Wilson, in *Murray v. Dawson* (1867), 17 C.P. 588, which arose upon the construction of certain provisions of the Fence-viewers Act—an Act which related to not only line fences but to ditches such as are authorized by the Act under consideration—where he is reported to have said: “To hold otherwise would, we think, open an appalling source of litigation and be opposed to the spirit and intention of the Legislature.”

In the view I take of the present case, the authorities cited as bearing upon the construction of various sections of the Municipal Act are not in point. I think the appeal ought to be allowed with costs.

Judgment.

LISTER, J.A.

*Appeal allowed.*

R. S. C.

## GEARING V. ROBINSON.

*Lien—Mechanics' Lien—"Owner"—R.S.O. ch. 153, sec. 2, sub-sec. 3.*

A person is not an "owner," within the meaning of sub-sec. 3 of sec. 2 of The Mechanics' Lien Act, R.S.O. ch. 153, and as such liable in mechanics' lien proceedings for work done or materials placed upon land in which he has an interest, unless there is something in the nature of a direct dealing between the contractor and the person whose interest is sought to be charged. Mere knowledge of, or consent to, the work being done or the materials being supplied, is not enough; there must be a request, either express, or by implication from circumstances, to give rise to the lien.

Judgment of McDougall, Co. J., reversed.

## Statement.

APPEAL by the defendants, the McGees, from the judgment at the trial.

The action was brought to enforce a mechanics' lien, and was, under sec. 33 of the Mechanics' Lien Act, R.S.O. ch. 153, tried before His Honour JUDGE McDougall, who, on the 11th of October, 1899, gave the following judgment in the plaintiff's favour:—

McDOUGALL, Co. J.:—

The plaintiff is a contractor, and contracted with the defendant, M. Robinson, through her husband as her agent, to do certain carpenter work upon the premises known as the Bijou Theatre, in the City of Toronto. The Robinsons were sub-lessees of these premises from the defendants, the McGees, for a term of nine years, to be computed from the 1st of May, 1898. The McGees were lessees from the Synod of Toronto, who were the owners of the fee, for a term of twenty-one years, to be computed from the 23rd of April, 1890. Before the present claim arose, a fire had partially destroyed the premises. The sub-lease contained a clause allowing the sub-lessees, the Robinsons, to make changes in the internal structure of the building, provided the plans for such changes were submitted to the sub-lessors and approved of by their architect, Mr. E. J. Lennox. A

further clause recited a contemplated expenditure by the sub-lessees of not exceeding \$12,000 during the first four years of the term for erecting an addition to and improving the premises, and the clause also provided for the insurance of the sub-lessees' interests by the sub-lessors on their receiving from the sub-lessees the premiums payable in such case. Then a clause followed, allowing the sub-lessors to terminate the lease, after four years upon giving six months' notice, and paying the sub-lessees the actual cost of the improvements. In 1898, after much discussion, a plan of rebuilding was arranged between the sub-lessees and the sub-lessors, and the sub-lease, dated March, 1898, was executed, and it was registered on the 27th of April, 1898. In consideration of the lease the McGees gave Mrs. Robinson, their tenant, the following letter :—

Toronto, April 19th, 1898.

Re McGee and Robinson, Bijou Theatre property, Toronto.  
Mrs. M. S. Robinson, Buffalo:

In consideration of the leasing of this Toronto property we agree to give you a bill of sale of all personal property now in or upon the said property ; we also agree to appropriate the sum of three thousand dollars in the rebuilding and repairs on said property to be paid at such time or times as may be mutually agreed between us.

(Signed) JOHN E. MCGEE,  
for heirs of the late John McGee.

The plans were submitted to and approved by Mr. Lennox, the architect named in the sub-lease, and the work was proceeded with. The McGees told Lennox that they were advancing three thousand dollars towards the cost of rebuilding. Difficulties arose during the progress of the work about money; brickwork to the value of about seven thousand dollars was completed, and the present plaintiff executed carpenter work to the value of about one thousand dollars; and the architect gave him a certificate entitling him under his contract to be paid \$941.20. No money being forthcoming, the contractors ceased working,

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McDOUGALL,  
Co. J.



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McDOUGALL,  
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and filed liens for their several claims. Prior to this the defendants, the McGees, advanced one thousand dollars towards the making of a payment to Page, the contractor for the brickwork. Page began the present lien action on behalf of himself and other creditors, but his claim was settled by the McGees. Gearing, the present plaintiff, was then substituted as plaintiff in the action, and now seeks to enforce his lien.

I think there is ample evidence to shew the privity and consent of the defendants, the McGees, who were lessors of the defendant M. Robinson, to the work being done in respect of which the plaintiff and others had become contractors. They had provided for a possible expenditure in the sub-lease, and had undertaken to recoup the sub-lessees if they terminated the lease within a certain time to the extent of probably twelve thousand dollars; they had agreed in the letter as consideration for the Robinsons executing the new lease to advance three thousand dollars towards the rebuilding. They might well agree to expend three thousand dollars, for they had received from the insurance companies eight thousand five hundred dollars as the damages they had sustained by the partial destruction of the theatre by fire in 1897, and there is no evidence before me that they had expended any of it in repairs up to the date of the execution of the lease of March, 1898.

I find that the plaintiff is entitled to a lien against the estate or interest that Mrs. Robinson had in the premises; but it is contended by counsel for the McGees, that they, the McGees, are not owners within the meaning of the Mechanics' Lien Act; it is said they are leaseholders only, and not being the owners of the fee it is argued that as between lessee and sub-lessee there is no provision made for a lien, or any provision made for realizing a lien as between persons in that relation; it is said to be *casus omissus*. I do not agree with this contention. Sub-sec. 3 of sec. 2 defines "owner" as including "any person having any estate or interest in the lands upon or in

respect of which the work or service is done . . . or on whose behalf or with whose privity or consent . . . any such work or service is performed."

Judgment.  
McDOUGALL,  
Co. J.

Sub-sec. 2 of sec. 7 enacts that when the estate charged is leasehold a fee simple may become subject to the lien with the consent in writing of the owner. Now, the interest sought to be charged here is the leasehold interest in the fee simple; therefore, a consent in writing is not necessary, and is not required by the statute in such cases. The privity or consent spoken of in sub-sec. 3 of sec. 2 may be evidenced by any satisfactory proof: *Blight v. Ray* (1893), 23 O.R. 415; but it is only when the lien is sought to be established against the leasehold interest, and further relief is claimed against the fee, that the consent of the owner of the fee is required to be in writing; and, in my opinion, the privity of the McGees is shewn, and also their consent to the work being done, by the terms of the written lease between themselves and Mrs. Robinson, contemplating extensive alterations in the building, their approval of the plans, their letter agreeing to advance three thousand dollars towards the cost of such rebuilding and repairs, and their actual advance of one thousand dollars towards the cost to avoid a stoppage of the work. All these facts, supported as they are by the evidence of Mr. Robinson and Mr. Lennox, the architect named in the lease, testified to in his account of the various interviews and conversations with the McGees before and during the progress of the work, establish satisfactorily both privity and consent.

After the stoppage of the work by the contractors, and after the filing of the liens, the McGees commenced an action to forfeit the lease to Mrs. Robinson for non-payment of rent; a decree was consented to by the Robinsons in consideration of a certain understanding that Mrs. Robinson should be indemnified by the McGees from the claims of the contractors who had filed liens. The nature of the understanding, though not recited in the formal

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judgment, appears in an undertaking in writing signed by the solicitor of the McGees and given to the Robinsons' solicitor. This undertaking is in the words following:—

“Dear Sirs,—The defendants, the McGee Estate, agree to pay and satisfy all liens registered against the lands herein, and to indemnify your clients herein against the same, and we, the undersigned solicitors for the McGee Estate, undertake that they will approve of this agreement by their solicitors. All your client's rights against Lennox reserved.”

The reception of this evidence, and the proof of the undertaking, were objected to by counsel for the McGees, but I think it was properly admissible, since it was explanatory of the circumstances attending the adjustment of the action brought by the McGees for forfeiting the lease to Mrs. Robinson. It is quoted in confirmatory proof of the allegation that the work of rebuilding was carried on with the privity and consent of the McGees, for in order to avoid costs and secure a consent judgment of forfeiture, they agree with the Robinsons not only to indemnify them, but to pay the outstanding liens. According to the uncontradicted evidence of the solicitor, the agreement was put into a separate document at the request of the defendants' (the McGees) solicitor, who objected to having the undertaking recited in the judgment. The Robinsons' solicitor had inserted a clause covering the point in the draft minutes, but the separate document was substituted therefor, and the clause itself struck out in the judgment. It may be noted that the McGees did not go into the witness box, and, therefore, all statements made by Robinson and E. J. Lennox are uncontradicted.

Upon a consideration of all the facts and the meaning of the clauses of the Mechanics' Lien Act bearing upon the question involved in this dispute, I am of opinion that the plaintiff's lien attaches to the estate or interest of the defendants, the McGees, in the land in question, and that the plaintiff is entitled to have a declaration to that effect.

The plaintiff is, therefore, entitled to judgment in his favour against the defendants, the McGees, and also Mrs. Robinson, for the amount of his claim as certified by the architect, \$941.20, and \$10 for the costs of filing his lien, together with his costs of the present action. The order will be issued in the usual form under the Act; if any dispute arises as to the wording of the order, the minutes can be spoke to.

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Co. J.

The appeal was argued before MACLENNAN, MOSS, and LISTER, JJ.A., on the 19th of March, 1900.

*Shepley*, Q.C., for the appellants. The learned Judge has gone too far in holding that the leasehold interest of the appellants is subject to the plaintiff's lien. They, of course, knew that work was being done on the premises in question, but they assumed no responsibility, and cannot in this indirect way be forced to pay their sub-lessees' debts. There is no liability under sub-sec. 2 of sec. 7 of the Act, even if that sub-section can be treated as applying to a leasehold interest at all, because there is no consent in writing. Nor is there any liability under sub-sec. 3 of sec. 2, for the appellants are not "owners" within the meaning of that sub-section. There must be something more than mere knowledge—some direct arrangement or acceptance of liability: *Graham v. Williams* (1884), 8 O.R. 478; (1885), 9 O.R. 458; *Garing v. Hunt* (1895), 27 O.R. 149.

[Moss, J.A., referred to *Tennant Planing Mill Co. v. Powell* (unreported), decided by the Court of Appeal on the 21st of September, 1893.]

The undertaking or letter relied on does not aid the plaintiff. It was not admissible in evidence on his behalf, and does not in terms purport to indemnify the Robinsons against any liens except those affecting the appellants' interest. Besides, the appropriate steps, by way of third party proceedings, have not been taken to obtain indemnity.



Argument.

*E. E. A. DuVernet*, and *D. C. Ross*, for the plaintiff. The work was done with the approval and consent of the appellants, and subject to the supervision of their architect. It was really done for them, and for the benefit of their leasehold interest, and to that interest the lien attaches : *Blight v. Ray* (1893), 23 O.R. 415. By forfeiting the sub-lease by consent the appellants have in effect adopted the liens existing against the sub-lessees.

*R. C. LeVesconte*, for the defendants, the Robinsons. Judgment having been recovered by the plaintiff against these defendants, they are entitled to be indemnified by the appellants.

*Shepley*, in reply.

May 15th, 1900. MACLENNAN, J.A.:—

The facts of this case are very fully stated in the judgment of the learned County Court Judge, who has held that the work and materials for which the lien is claimed was done, and were supplied, with the privity and consent of the appellants.

With great respect, and, I confess, with some regret, under the particular circumstances, I feel myself obliged to come to a different conclusion from that of the learned Judge. The appellants agreed, when they put an end to the lease by the consent judgment of the 14th of February, 1899, to indemnify the Robinsons against all liens. They have discharged the lien of the contractor for the brick-work, but they refuse to discharge that of the plaintiff, although they have had the benefit of it. Whether the plaintiff can now obtain any advantage by his lien against the Robinsons' interest in the property under the lease, not having been a party to the action which put an end to it, is not now before us. The plaintiff undoubtedly became entitled to a lien against the leasehold interest of the Robinsons, and that part of the judgment cannot be disturbed. How, or with what result, it may be worked out or enforced is for the learned County Judge.

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J.A.

On the principal question, that is, the lien claimed against the interest of the McGees, the only contention made before us was that the work was done, and the materials were supplied, with their privity and consent, within the meaning of sec. 2 (3). It was, however, held in *Graham v. Williams* (1884), 8 O.R. 478, by the Chancellor, and in the Divisional Court (1885), 9 O.R. 458, by Proudfoot, and Ferguson, JJ., that mere knowledge of, or mere consent to, the work being done is not sufficient, and that there must be something in the nature of a direct dealing between the contractor and the person whose interest is sought to be charged. I am not aware that this view of the proper construction of the Act has been questioned, except in *Blight v. Ray* (1893), 23 O.R. 415, by Ferguson, J., at p. 421, when that learned Judge throws some doubt upon it. I think that is the view of the Act which was taken by this Court in the unreported case, *Tennant Planning Mill Co. v. Powell*, in which, on the 21st of September, 1893, judgment was pronounced allowing the appeal at the conclusion of the argument. The printed appeal book will be found in the volume of cases for March, 1893. I think the language of the sub-section itself calls very strongly for that construction. What it says is, that the person whose interest is to be charged is to be one at whose request, *and* certain other things, the work is done, etc.: which means, as I take it, that whatever else there may be, there must be a request, either express, or by implication from circumstances, in order to give rise to the lien. It is sec. 4 of the Act which gives the lien, and the two sections must be read together. What sec. 4 says is that the contractor, etc., performing work *for any owner*, etc., shall have a lien upon the land, etc., upon which the work is done. Reading sec. 2 (3) with sec. 4, it would be thus expressed: A contractor performing work, etc., for any owner, at his request *and* upon his credit, or on his behalf, or with his privity or consent, or for his direct benefit, shall have a lien, etc. Now, if we inquire for whom, and

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at whose request, *and* upon whose credit, or on whose behalf, or with whose privity or consent, or for whose direct benefit, this work was done by the plaintiff, there can be only one answer. Mrs. Robinson had an interest in the land, and the work was done for her, at her request, *and* upon her credit and on her behalf, etc. And there is no evidence of any request by the sub-lessors, nor of any dealing of any kind between them and the plaintiff. This may seem a very strict and literal construction of the Act; but if it is, as I think it is, the plain meaning of the language of the Legislature, we must so construe it, and I do not think we ought to change *and* into *or*, or strain the language, in order to charge one man's land with another man's debt. The part of the sub-section under consideration remains now exactly as it was enacted in 1874, 38 Vict. ch. 20, sec. 1 (O.), notwithstanding the numerous revisions, re-enactments, and amendments, which have since been made.

I think, too, the same inference is to be drawn from sec. 2 (1), defining the word "contractor," who is said there to mean a person contracting with, or employed directly by the owner, for the doing of work, etc.; and it is as a contractor that the plaintiff makes his present claim.

I think, therefore, that the appeal of the defendants, the McGees, must be allowed, and that the plaintiff's claim to a lien against their interest in the land must be dismissed.

That being so, I think we cannot, in this action give effect to the agreement for indemnity claimed by the Robinsons against the McGees, and that the appeal in that respect must also be allowed. The judgment must, however, stand for what it may be worth for a lien against the interest of the Robinsons.

Under all the circumstances, I think there should be no costs of the appeal.

MOSS, J.A.:—

Judgment.

Moss, J.A.

I agree that the appeal must be allowed, but I see no reason for depriving the successful appellants of their costs.

LISTER, J.A.:—

I agree that the appeal should be allowed with costs.

*Appeal allowed.*

R. S. C.

### ECKARDT V. LANCASHIRE INSURANCE COMPANY.

*Insurance—Fire Insurance—Co-insurance Condition—R.S.O. ch. 203, s. 171.*

Where the premium is reduced in consideration of the insertion in a policy of fire insurance, in the manner prescribed by the Ontario Insurance Act, R.S.O. ch. 203, s. 169, of the condition commonly known as the “co-insurance condition,” that condition is *prima facie* valid and should not be held to be “not just and reasonable” within the meaning of section 171 of the Act, without evidence to that effect, BURTON, C.J.O., and MOSS, J.A., dissenting.  
Judgment of MEREDITH, C.J., 29 O.R. 695, affirmed.

APPEAL by the plaintiffs from the judgment of MEREDITH, C.J., reported 29 O.R. 695.

Statement.

The action was brought to recover a loss under a fire insurance policy, and the question involved was the validity of the condition commonly known as the “co-insurance condition,” which was held, in the Court below, to be valid, and binding upon the plaintiffs. The form of the condition, and the facts of the case, are set out in the report below and in the judgments in this Court.

The appeal was argued before BURTON, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, J.J.A., on the 27th of September, 1899.



Argument.

*Lash*, Q.C., and *A. W. Anglin*, for the appellants. The judgment appealed from is founded upon the fallacy that reasonable men having agreed to the condition it is *primá facie* reasonable. But it is quite clear that the assent or agreement of the insured is not an element to be considered in deciding the question of the reasonableness of a condition. *Primá facie* every variation from the statutory conditions is unreasonable and the onus was upon the respondents to shew that, under the circumstances of this case, that *primá facie* invalidity did not arise. That onus they have not attempted to discharge. The fact that the policy states that the premium has been reduced because of the insertion of the condition in question does not aid the respondents. The alternative rate, or even the rate agreed to, may, for all that appears, be exorbitant or unjust; and a reduction from an exorbitant rate would be no answer. The condition is not only *primá facie* unreasonable, but is in fact unreasonable. By its terms the value of the insurance may vary from day to day, and the utmost vigilance would not enable the insured to protect himself against loss. An unexpected arrival, or delayed shipment, of goods, or a sudden rise in market values, might at any time alter the proportion of the insurance to be made good by the insured. Fixing the standard at seventy-five per cent. is an arbitrary mode of dealing with the matter, and the companies might just as well say that the standard must be ninety per cent. A condition of this kind is repugnant to the contract, and cuts down what purports to be a contract of absolute indemnity to a contract of partial indemnity only, and it cannot be reasonable to allow this.

*Osler*, Q.C., and *Creelman*, Q.C., for the respondents. Much of the argument of the appellants is beside the question. They lose sight of the fact that this is an alternative mode of insurance, and the insured, if he wish, may have, at the full rate of premium, a policy without this condition. It is true that the acceptance of a policy

by the insured is not conclusive as to the reasonableness of the conditions inserted in it, but that is in cases where he must take the policy with the objectionable features in it or do without insurance. Here there is nothing of that kind. The insured deliberately elects to take a cheaper form of insurance, and binds himself to take the reasonable precaution of keeping his property insured, either in fact or at his own risk, to the extent of three-fourths of its value. This condition has always been used in marine insurance and it has become also a well recognized term of fire insurance.

Argument.

*Anglin*, in reply.

May 15th, 1900. BURTON, C.J.O.:—

This Court held in *Wanless v. Lancashire Insurance Co.* (1896), 23 A.R. 224, that the co-insurance clause, as it is called, was to be regarded as a condition within the meaning of the Insurance Act, but having regard to the importance of so holding to insurance companies I regret that the case had not been carried further so that there might be a final and authoritative decision upon it. The company, however, instead of appealing, have acquiesced in the decision and this case now comes before us upon the one question, that, being a condition, was it in the opinion of the Court a just and reasonable one to be exacted by the company?

It appears to me, bearing in mind the evils which the statutory conditions were intended to meet, that the agreement of the assured for a consideration to accept a policy with this co-insurance clause in it is immaterial; although there is no evidence beyond what is furnished by the policy itself that the plaintiffs had any knowledge of the existence of a double rate and an option to accept a policy without the clause, and I do not think that any such inference can be drawn from the language of the policy; it merely shews that the premium had been reduced but

Judgment. does not shew that the company insured on any other  
BURTON, C.J.O. terms.

I agree with the view taken by the late Mr. Justice Patterson in the case of *May v. Standard Fire Ins. Co.* (1880), 5 A.R. at p. 619, where he says: "I am disposed to set entirely aside the consent of the insured to the condition as part of the contract. . . The statute rejects the fiction of agreement; and truly regarding every variation of or addition to the statutory conditions as something exacted by the company or individual insurer, not voluntarily agreed to by the insured, requires the variations and additions to be accompanied with the declaration that they are in force so far as by the court or judge before whom a question is tried relating thereto, they shall be held to be just and reasonable to be exacted—which I understand to mean insisted on as one of the terms on which the policy is granted."

The evidence does not disclose, except as I have mentioned, that the plaintiffs were at liberty to make other terms than those of the policy in question, which alone is to be looked at, and it must, I think, be assumed that in order to get that policy they were obliged to take it with this particular exacted variation, and then the Court is to say whether such variation is reasonable to be imposed or exacted.

No doubt if we had no such statute, if the insured had placed before him the option of insuring at a higher rate without the co-insurance clause and the lower rate with it, he would be bound by his election; but it is notorious that even men beyond the average of the insuring public would find it difficult clearly to understand the meaning and effect of a policy insuring the goods to the extent of \$15,000, as it appears on the face of the policy subject only to the co-insurance clause, and it is, I think, very fairly urged by the appellants that one of the tests of the reasonable nature of a variation should be its simplicity

and the capability of its being easily understood by the average insured.

Judgment.

BURTON, C.J.O.

In *Butler v. Standard Fire Ins. Co.* (1879), 26 Gr. 341, the late Chancellor Spragge is reported to have said: "The policy of the law as evinced by legislation is, that parties insured are a class requiring protection; that insurances are contracts between public companies, some of whom are disposed to act inequitably and to overreach, on the one hand; and individuals who as a class are in the matter of insurance improvident; and this should be borne in mind in construing a policy of insurance."

It is of course not pretended that the defendants, who are a highly respectable company, acted otherwise than with the utmost fairness in effecting this insurance; but applying the test to which I have just referred the condition in question will not bear it. It is safe to say that most persons not being experts would find it somewhat difficult to appreciate the general effect of the condition and when applied to a particular partial loss which would require the making of a somewhat complicated calculation the result would not be easily understood.

The stock insured in this case was that of a wholesale grocer, varying in value from day to day, and the proprietor could form no accurate judgment of the receipts or additions to that stock or the daily sales; the market value of such a stock might in a single night very greatly increase or decrease, and in the former case without any act on his part and without his knowledge or consent he would find his policy reduced, or in the event of his being insured in other companies and one or more of these policies becoming invalid the loss would fall not upon the other companies but upon him.

To illustrate my meaning: The condition required the insured to maintain insurance to the extent of at least 75 per cent. of the actual cash value at the time of the loss. That value is ascertained to be \$115,000. If the value the night before had been, say, between \$93,000 and \$94,000



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BURTON, C.J.O.

and had so continued the condition would have been complied with as there would have been other insurance to the amount of 75 per cent., but if the additional value was caused by a sudden rise in value, would it be a reasonable condition to be exacted by the company to allow that sudden rise in value to affect the insurance?

In *McKay v. Norwich Union Ins. Co.* (1895), 27 O.R. 251, it was held that a condition requiring incessant vigilance on the part of the insured in order to keep his policy in force has only to be stated and its unreasonableness is at once established. I think, with great deference, that I must differ from the learned Chief Justice and must hold that this is a condition which it was not just or reasonable to exact from the plaintiff, and that it is for that reason invalid.

OSLER, J.A.:—

The action is upon a policy of fire insurance granted by the defendants to the plaintiffs, and the only question is whether one of the conditions, which has been called a co-insurance clause, added to the statutory conditions, is a just and reasonable condition.

The terms in which the liability of the company is expressed on the face of the policy are as follows:—

“Now, therefore, be it known that from.....  
to.....the capital stock and funds of the company shall, subject to the terms and conditions hereinafter mentioned and contained in the company’s deed of settlement, be subject and liable to pay to the said assured .....all such loss and damage which the said assured may suffer by fire in the sum mentioned below, that is to say: on property described in printed form attached, \$15,000, H. P. Eckardt & Co., 19 Front Street, Toronto (follows here the description of property in printed slip attached) in lieu of policies 4012200 and 4015554. Subject to 75% co-insurance.” This last clause “subject, etc.,” is in red ink.

Judgment.

OSLER, J.A.

The 9th statutory condition is:—

“In the event of any other insurance on the property herein described, having been assented to as aforesaid, then this company shall, if such other insurance remains in force, on the happening of any loss or damage, only be liable for the payment of a ratable proportion of such loss or damage without reference to the dates of the different policies.”

The condition in dispute is No. 14 of the variations and conditions:—

“The premium having been reduced in consideration of this condition the assured shall, during the currency of this policy, maintain insurance concurrent with this policy on each and every item of the property insured to the extent of at least 75% of the actual cash value thereof, and if the insured shall not do so the company shall only be liable for the payment of that portion of the loss for which the company would be liable if such amount of concurrent insurance had been maintained.”

This condition is not inconsistent with the 9th statutory condition nor a variation of it. It is to be regarded, as the *Wanless* case decides, as an additional condition, the effect of which practically is to provide that instead of further insurance being optional with the assured there shall always be further insurance upon the stock insured by the defendants' policy to a specified proportion of its value, so that in the event of loss the 9th statutory condition shall inevitably come into play and thus reduce the amount which would otherwise be payable under the policy, in the manner thereby provided.

So much of the argument before us was addressed to the question whether (as the plaintiffs contended) an addition to or variation of the statutory conditions was to be regarded as *prima facie* void as unjust and unreasonable, and whether or not there was a presumption against its validity, that in dealing with the case it is well to go back

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OSLER, J. A.

to the words of the Act, which for the present purpose may be read from the Revised Statutes, ch. 203.

The 168th section provides that the conditions set forth therein shall as against the insurer be deemed to be part of every contract of insurance and that "no stipulation to the contrary, or providing for any variation, addition, or omission, shall be binding on the assured unless *evidenced* in the manner prescribed by sections 169 and 170."

Section 169 provides: "If the insurer desires to vary the said conditions, or to omit any of them, or to add new conditions" he must do so in the prescribed manner, viz., by adding on the instrument words "to the following effect" printed in conspicuous type and in ink of a different colour.

"Variations in Conditions.

This policy is issued on the above statutory conditions with the following variations and additions. These variations (or as the case may be) are, by virtue of the Ontario statute in that behalf, in force so far as, by the court or judge before whom a question is tried relating thereto, they shall be held to be just and reasonable to be exacted by the company."

Then by section 170, it is enacted: "No such variation, addition or omission, shall, unless the same is distinctly indicated and set forth in the manner or to the effect aforesaid, be legal and binding on the assured; and no question shall be considered as to whether any such variation, addition or omission is, under the circumstances, just and reasonable, but on the contrary, the policy shall, as against the insurer, be subject to the statutory conditions only, unless the variations, additions or omissions are distinctly indicated and set forth in the manner or to the effect aforesaid."

Lastly, section 171 enacts: "In case a policy is entered into or renewed containing or including any condition other than or different from the conditions set forth

in section 168 of this Act, if the said condition is held by the court or judge, before whom a question relating thereto is tried, to be not just and reasonable, such condition shall be null and void."

In the case of *Queen Ins. Co. v. Parsons* (1881), 7 App. Cas. 96, the meaning of the phrase "as against the insurer" was expounded, and it no longer admits of doubt that a condition may be added, or a statutory condition varied, so as to make the terms of the insurance contract more onerous to the insured or more favourable to the insurer than those provided by the statutory conditions.

It is plain that the insurer has the right to vary or add to the conditions. This is implied in the phrase "if the insurer desires to vary the said conditions." But unless his desire is "evidenced" in the prescribed manner, the added or varied conditions are not legal or binding on the insured because in that case they form no part of the contract, not having been brought to his notice.

The very object of the conspicuous type and ink of different colour is to give notice to him that there are conditions which the insurer is *exacting* from him, and which, by accepting the policy containing them, would by the general law of the land become part of his contract. Equally true is it that when evidenced in the prescribed manner, as in the case before us they are, the added or varied conditions do become part of the contract, subject, of course, to the qualification of section 171, by force of which they may be annulled if adjudged to be not just and reasonable. And when, subject to this qualification, they are part of the contract, I do not see that there is necessarily any presumption against their justice and reasonableness. It may be argued from their very terms in connection with the statutory conditions or otherwise that they are intrinsically unjust or unreasonable, as for example, where they vary as against the insured one of the statutory conditions, or they may be shewn to be so by extrinsic evidence, but it is only if they are held on one

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or other of these grounds to be so that they are avoided. The contract having been made and evidenced in a lawful manner, the onus must be upon the insured to get rid of it if he can by shewing that it falls within section 171. This may be an easy task in the case I have suggested, but in strictness it seems to me that there being a contract it must rest upon the insured in the first instance to shew why any of its terms should not be binding upon him. I do not think these views are opposed to anything which has been actually decided by any case by which I am bound, or inconsistent with anything which I have myself said in *Smith v. City of London Ins. Co.* (1887), 14 A.R. 328, 336; or *Reddick v. Saugeen Mutual Fire Ins. Co.* (1888), 15 A.R. 363.

Then is this a condition which ought to be held not just and reasonable to be exacted by the company?

It is a condition not unusual in English fire policies and it is said to be equitable though it does compel the insured to keep up insurance to a certain specified proportion of the stock.

The co-insurance clause in fire policies is said to be of comparatively modern date, having been introduced in England by 9 Geo. IV., ch. 13, for revenue purposes.: Griswold's Fire Underwriters' Text Book, sec. 366.

It is a simple stipulation that the insured shall bear such proportion of any loss as the value of the property at risk, in excess of the insurance thereon, shall bear to the amount of insurance thereon, or to the interest of the insured therein; or, in other words, that the underwriter shall be liable for such proportion only of the property at risk, lost or damaged by fire, as the amount of his insurance may bear to the value of the entire property at risk, or the interest of the insured therein; the insured being held as co-insurer to the extent of any excess of value above such insurance: *ibid.*, sec. 371.

"It is based upon the equitable principle, that where the insured elects to stand his own insurer upon any portion

of his property . . . he should be regarded in the light of, and treated in contribution to losses under his policies as if he were, another company interested to the same amount as the excess, and, consequently, held liable for a corresponding portion of the loss:" *ibid.*, sec. 372.

So far as the insurer is concerned there would be contribution to the full value of the property at risk either by direct policies or by the insured as co-insurer.

I can see nothing in the nature of such a stipulation as this which should induce us to hold it unjust and unreasonable. It is really no more than a limitation of, or a means of ascertaining, the amount which the insurer is willing to undertake as his liability upon the policy when the lower rate of premium is accepted by the insured. It is either expressly or by implication the subject of special contract in each particular case.

I have spoken of it as a condition, because a clause in somewhat similar terms although inserted in the body of the policy seems to have been held by this Court in the case of *Wanless v. Lancashire Ins. Co.* (1896), 23 A.R. 224, to be a condition within the meaning of the Act, and void on the ground that it had not been evidenced as the Act prescribes. I was not a party to that decision but am bound by it as far as it goes. For the purpose of this case it decides no more than I have stated, and the defendants have followed it by placing the clause among their conditions. I am not myself capable of understanding how a clause of this nature, which must on the lowest ground be taken to have been deliberately accepted by the plaintiffs as stating a contract for consideration regulating the amount which should be payable under the policy, can well be described as a condition exacted by the company. If that was not their agreement (and being evidenced in the prescribed manner I do not see how they can be permitted to say that it was not) it seems idle to say that they had not the option of refusing the policy and of not insuring with the defendants at all or of insuring at the higher

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premium free from the co-insurance clause. I do not pursue this further, but, regarding the clause as a condition, I am of opinion that it ought not to be held not to be just and reasonable.

The Legislature has placed no restriction upon the power of the insurance company to establish its own rates or to make alternative rates for special terms of insurance, and it goes without saying, that it may stipulate for the amount of the risk it will assume upon any class of property. If there be, as I suppose we must, in this case, assume, contrary to my own opinion of its meaning, that there is, an absolute contract on the face of the policy to indemnify against loss up to the sum specifically named, though to do so is to disregard part of the contracting clause "subject, etc.," the contract cannot be further cut down or limited by a condition which is not just and reasonable, but I do not think that the company is precluded from contracting upon the face of the policy, in terms not capable of being distorted into a condition, to pay, not a specified sum, but a proportion of the loss ascertainable in a manner specifically provided for, as for example, two-thirds of the loss, or in effect (in the manner provided for by the condition in question) such proportion of the loss as 75% of the stock insured at the time of happening of the loss bears to the amount named in the policy, as the limit of the defendants' liability, so that by the terms of the contract itself and not by any condition imposed or exacted by the company reducing the amount which upon the face of the policy they appear to have contracted to pay, the extent of the indemnity is defined or ascertainable. If this may be done by the contract of insurance apart from the conditions dealt with by the Act, it is not easy to see why a condition providing for the same thing is unjust and unreasonable, and *a fortiori* where it is agreed upon in consideration of a reduced rate of premium as in the present case.

The case of *Sun Mutual Ins. Co. v. Pekor* (1898), 31 S.E. Rep. 779, may be referred to, in which a question somewhat analogous to that before us was considered. The Civil Code of the State of Georgia, section 2110, provides that all insurance companies shall pay the full amount of loss sustained upon the property insured by them provided the said amount does not exceed the amount of insurance expressed in the policy, and that all stipulations in such policies to the contrary shall be null and void. It was held that a stipulation in such a policy to the effect that should the insured fail to comply with a covenant on his part to "at all times maintain a total insurance upon the property insured of not less than 75% of the total cash value thereof he shall be deemed to be a co-insurer to the extent of the deficiency and in that event shall bear his proportion of any loss occurring under this policy," was not a contravention of the above section of the Code. The justice and reasonableness of such a provision appear to be fully assented to in the opinion of the Court.

I agree, therefore, with the reasoning and conclusion of the learned trial Judge and think that the appeal should be dismissed.

MACLENNAN, J.A. :—

I am of opinion that the appeal should be dismissed.

In the *Wanless* case I held that the clause in question was a condition within the meaning of the Insurance Act, and I see no reason to change that opinion.

The further question is whether, being a condition, it is just and reasonable. Whether a particular condition is just and reasonable must depend on its nature, and also upon the circumstances of the case in which it is sought to be applied. Some conditions might be obviously unjust or unreasonable under all or any circumstances; and the justice or reasonableness of others might depend on the subject of the insurance or the surrounding circumstances

Judgment.

OSLER, J.A.



Judgment.

MACLENNAN,  
J.A.

Where appliances for extinguishing fires are imperfect or absent, conditions might be just and reasonable, which would be otherwise where such appliances were present and efficient. In the present case there is nothing special either in the nature of the subject of insurance, or in the surrounding circumstances affecting the risk. The stock of goods insured may be said to be large, and the proportion of the risk assumed by the appellants considerable, and I see nothing unjust or unreasonable in this condition as applied to the case. It is obvious that the condition considerably diminishes the risk to the insurers, whenever the value of the stock insured greatly exceeds the amount of the policy; and when, as here, there is a corresponding reduction of premium, it cannot, in my opinion, be regarded as unjust or unreasonable.

Moss, J.A. :—

The facts of this case are not many.

The plaintiffs are wholesale grocers carrying on business in the City of Toronto. They made application to the defendants to effect an insurance to the extent of \$15,000 upon their stock of goods, wares, and merchandize in their warehouse on Front Street East, Toronto, and in return received the policy now sued on, dated January 2, 1896.

In considering the case, it is well to look at the original policy, for the printed copy in the appeal book scarcely conveys an exact idea of its appearance and contents as they would be likely to strike the assured when they examined the original. The premium or first payment is expressed to be \$112.50, and it is declared that whereas the plaintiffs have paid the defendants the first payment for insuring the property described, from the 2nd of January, 1896, to the 2nd of January, 1897, it is to be known that from the date first mentioned to the date last mentioned, and for so many years after as the plaintiffs shall pay to the defendants the sum required for renewal,

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MOSS, J.A.

the capital stock and funds of the defendants shall, subject to the terms and conditions thereafter mentioned, and contained in the defendants' deed of settlement, be subject and liable to pay to the plaintiffs, their heirs, etc., "All such loss and damage which the said assured may suffer by fire . . . that is to say, on property described in printed form attached, \$15,000." Then follow the printed form and the words "Fifteen thousand dollars," then references to other policies and an insurance plan. Then, dissociated from all these, and some space below them, are the words, printed in red ink, "Subject to 75% co-insurance."

Then follow the conditions, viz., the statutory conditions, and after them the variations in conditions, the 14th of which is that which has given rise to the questions involved in this action, and which has been called the co-insurance condition or clause.

It is admitted that the plaintiffs had no actual notice or knowledge, or any notice or knowledge save such as may have been conveyed by the policy itself, that the defendants had two different rates and dealt in two different kinds of policies, and it was not shewn that the plaintiffs had presented to them the choice of accepting the policy in question with the co-insurance condition in consideration of the premium being reduced, or rejecting it and obtaining a policy without the co-insurance condition on paying a higher premium. There is no evidence of any bargaining or negotiating on any such footing. All that appears is that the plaintiffs applied for a policy and the one in question was given them, and that there was a difference from the ordinary rate, said to be 20%, or at all events of a substantial character, but the plaintiffs were not aware of it, unless they are to be held to have known of it by reason of the terms of the policy.

The policy was renewed on the 2nd of January, 1897, and during the term the plaintiffs' warehouse was partially destroyed by fire and the stock of goods, wares, and merchandize under insurance was destroyed or damaged to

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MOSS, J.A.

the extent of \$42,120.71. The cash value of the insured stock at the time of the fire was \$115,000, and there were other insurances to the amount of \$55,000, making with the defendants' policy \$70,000. This sum was of course less than 75% of the cash value of the stock.

The defendants contending that the amount of insurance which the plaintiffs under the co-insurance condition should have maintained upon the stock was \$86,250, that being 75% of \$115,000, and that the ratable proportion to be paid by them in respect of their policy upon that basis was \$7325.34, paid that sum to the plaintiffs. The plaintiffs contending that the defendants were bound to pay their ratable proportion on the footing of \$70,000 insurance, and that upon that basis the defendants were liable for \$9025.87, brought this action to recover \$1700.53.

The action was tried by Meredith, C.J., without a jury. He determined that the plaintiffs were bound by the terms of the co-insurance condition, that it was valid, and that he could not hold that it was a "not just and reasonable condition," and he dismissed the action.

In dealing with this case, I think—in view of the decision of this court in *Wanless v. Lancashire Ins. Co.* (1896), 23 A.R. 224—we must treat the co-insurance clause as a condition, and therefore as a variation of the statutory conditions to which all contracts of fire insurance are subject. Indeed by inserting it among the additional conditions the defendants have made it impossible for us to deal with it otherwise than as a condition. We cannot treat it as having any other place in the policy. I do not think any special weight is to be attached to the presence of the words "subject to 75% co-insurance" upon the face of the policy, especially having regard to their position. They cannot be looked upon as doing more than drawing attention to the condition, which had already been done by the statement previously made in the policy that the insurance was subject to

the terms and conditions thereafter mentioned. Nor do I think that it ought to be inferred that from seeing these words and reading the co-insurance clause or condition the plaintiffs were informed that the defendants were effecting insurances upon other terms and at other rates than those shewn in the policy.

I do not think the conclusion can be drawn from what is shewn in the case that the plaintiffs had the option presented to them by the defendants of being insured by the defendants without the clause if they chose to pay a higher rate of premium, and that they were satisfied to take the benefit of the lower rate, and in consideration thereof to limit the amount of the defendants' liability to them.

I think, with all deference, that this is not made to appear. Besides, to hold that the plaintiffs in consideration of the reduced rate agreed to a condition limiting the extent of the defendants' liability, is to say that it is open to insurance companies, notwithstanding the Insurance Act, to make special bargains for the imposition of additional conditions, thus depriving the insured of the protection with which the statute invests them. To so hold is to expose persons about to insure to all the evils from which it was the policy of the Act to protect them.

Some of these evils were forcibly pointed out by the late Sir Adam Wilson, speaking for the Court of Queen's Bench, in the case of *Smith v. Commercial Union Ins. Co.* (1872), 33 U.C.R. 69. In *Parsons v. Queen's Ins. Co.* (1882), 2 O.R. 45, Armour, J., has given a full account and history of the proceedings leading to the enactment by the Legislature of the Act 39 Vic. cap. 24 (O.), whereby a set of conditions settled and approved of by a Board of Commissioners was approved of and adopted. It was also enacted that the conditions should, as against the insurers, be deemed to be part of every policy of fire insurance thereafter entered into or renewed or otherwise in force in Ontario with respect to any property therein;

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MOSS, J.A.



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MOSS, J.A.

and further, that if a company or other insurer desired to vary the said conditions or to omit any of them, or to add any new condition, the variations should, amongst other things, be preceded by a conspicuously printed statement to the following effect: "These variations are, by virtue of the Ontario statute in that behalf, in force so far as, by the court or judge before whom a question is tried relating thereto, they shall be held to be just and reasonable to be exacted by the company."

The reasonableness of the statutory conditions and of the provisions with regard to variations has been questioned in no case that I am aware of.

It is plain, not only from the language of the above statement but also from the pains taken to attract attention to it, that it is to be taken as coming from the insurers seeking to impose or "exact" conditions other than those sanctioned by the Act.

I do not think it is competent for an insurer, by inserting in one or more of the variations a statement that such variation is there upon, or by reason of, a consideration, to oust the court or judge of the obligation or duty of determining whether it is just and reasonable to be exacted or to compel the court or judge to say that because there is a consideration expressed or given, therefore it is just and reasonable to be exacted.

In inserting variations upon their policies, the insurers assume the burden of shewing that they are just and reasonable to be exacted as part of their general contract with the insured; and if they stand, they must stand not because the insured has agreed to them or accepted them, but because they are in themselves just and reasonable to be exacted: *May v. Standard Fire Ins. Co.* (1880), 5 A.R. at p. 619.

The Legislature shews its solicitude in guarding against any attempt to give effect to a variation save in the manner prescribed. Section 170 of the Act declares: "And no question shall be considered as to whether any

such variation . . . is, under the circumstances, just and reasonable, but on the contrary, the policy shall, as against the insurer, be subject to the statutory conditions only, unless the variations . . . are distinctly indicated and set forth in the manner or to the effect aforesaid."

Judgment.

MOSS, J.A.

Why should not an insurer be permitted to agree, for a consideration, that, notwithstanding this provision, variations may be considered and held to be just and reasonable though not properly indicated and set forth, if it be lawful to agree that a certain variation shall be held to be just and reasonable because accepted for a consideration?

In *Smith v. City of London Ins. Co.* (1887), 14 A.R. 328, one question was as to statutory condition No. 17 and a variation introduced into the policy. It was pointed out that that condition differs from the other statutory conditions because, while providing for a delay of thirty days as *prima facie* just and reasonable in all cases, it contemplated two ways in which it might be "otherwise provided," viz., by statute or agreement of the parties. In other words that, with regard to that condition, there might be a variation by agreement of the parties, which agreement might preclude enquiry into the justice and reasonableness of the variation. But my brother Osler shewed that the defendants in that case had not brought themselves into a position to insist upon the variation as an unqualified one, and that it could only be held to be an agreement by virtue of the general rule that if a document in common form is delivered by one of two contracting parties to and accepted by the other without objection, it is binding upon him whether he informs himself of its contents or not. Dealing with the case from that point of view, he said (p. 336): "Conceding for a moment that a policy of fire insurance, the conditions of which have been so specially provided for by statute, is such a document, the agreement thus sought to be raised is

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qualified by the defendants themselves by the express proviso that it shall be deemed to be in force only so far as by the court or judge it shall be held to be just and reasonable to be exacted by them. Therefore if it be an agreement at all it is a qualified one, and its justice and reasonableness are by the terms of the contract, if not by force of the statute, a matter for the court or judge to determine. This variation, therefore, whether it be regarded as a mere qualification of the contract evidenced by the policy and conditions (and perhaps that is the proper way to look at any additions to or variations of the statutory conditions), or as a variation exacted by the company and not depending upon agreement at all, must be dealt with just as any other variation of a statutory condition, and is in force or binding only so far as it may be held to be just and reasonable to be exacted by the company."

These views were concurred in by the other members of the court, and received the sanction of the present Chief Justice of Canada in 15 S.C.R. at p. 76.

So in this case the variation in question should be dealt with just as any other of the variations would be dealt with, entirely without reference to supposed agreement or special consideration.

And, with great deference, I think Meredith, C.J. attached too much weight to the freedom which in general the law gives to all persons *sui juris* to contract as they please, and not enough to the terms of the policy and the provisions of the Act, which in regard to contracts of fire insurance imposes important limitations upon the general right.

I agree with the learned Chief Justice in thinking that the 14th variation or co-insurance clause is a variation of statutory conditions Nos. 8 and 9.

But he appears to me to cast upon the plaintiffs the burden of shewing that, nevertheless, it is "not a just and reasonable condition to be exacted," whereas I think that

by the terms of the Act and the policy it is in force only so far as by the court or judge it shall be held to be just and reasonable to be exacted, and that this casts upon the company the burden of shewing its justice and reasonableness before it can be held to be in force and binding against the insured.

I think that if I were stating the proposition suggested by the learned Chief Justice I would say that I think that with regard to the matters dealt with by the statutory conditions the intention of the Legislature is that what is found there should be taken to be that which *primâ facie* should be the most the insurer should be at liberty to exact from the insured and that anything beyond that must stand the test of the insurers being able to satisfy the court or judge that it is just and reasonable to be exacted.

True section 171 declares that if any such additional condition or different condition to those allowed by section 168 is held by the court or judge to be not just and reasonable it shall be null and void. But that does not alter the form of the issue to be tried. The question to be tried is still "Is the variation a just and reasonable one to be exacted by the company?" If it is it is in force and binds. If it is not it is null and void.

The question in this case, as in every case of a variation of the statutory conditions, should be, Have the defendants established that the variation relied upon is a just and reasonable one to be exacted? And, to adapt the language of my brother Osler at p. 335 of *Smith v. City of London Ins. Co.* (1887), 14 A.R. 328, unless the defendants can maintain the 14th variation as a just and reasonable variation the statutory conditions will govern the case.

But for the 14th variation the plaintiffs' position under the policy is that they are entitled to indemnity from the defendants to the extent of the sum named in the policy subject only to the provisions of statutory con-

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dition No. 9. See *Thompson v. Montreal Ins. Co.* (1850), 6 U.C.R. at p. 325.

They were neither bound to insure nor to keep insured in any other company in order to maintain their claim to full indemnity from the defendants, but if they were insured in other companies with the assent of the defendants and such insurances were on foot when a loss happened the defendants were entitled in the event of the loss proving less than the aggregate of all the insurances to a *pro rata* reduction of the amount of their liability. But the effect of the 14th variation is to impose on the plaintiffs not only the obligation to submit to a *pro rata* reduction where there are other existing insurances but the imperative obligation to insure in other companies and to keep such insurances existing to an extent sufficient to cover 75% of the value of the stock, otherwise—in the event of a loss—to submit to a *pro rata* reduction upon the footing of there being existing insurances to that extent.

That this is an onerous condition and one difficult of performance can readily be seen. It puts the insured in such a position that even the utmost vigilance on their part may not keep them secure. They are subject always to the risk of the defendants' liability suddenly lessening with the lapse of other policies or with fluctuations in the value of the stock. They must keep following up any increase in value by additional insurance. The condition is not performed by the effecting of even valid and sufficient insurances at the time of accepting the defendants' policy. The insured are bound to see that there are always continued valid and sufficient insurances or otherwise lose their right to complete indemnity.

Under condition No. 9 the defendants get the benefit of other insurances if existing at the time of the loss. But under the variations they are entitled to the same benefit though no insurances may be actually existing. And the case is the same where there are insurances in fact, which turn out not to be capable of enforcement or collection.

It seems to me that such a variation, if found in a policy with the ordinary rate of premium, could not be upheld as just and reasonable. And as I have already endeavoured to shew the introduction into it of a statement that the premium has been reduced in consideration of the condition ought not to be permitted to form any element in the determination of the question.

If, as appears to be the case, the principle of co-insurance in fire risks has been recognized in England by statute, and it is considered to be just and reasonable to adapt it to contracts of fire insurance under some circumstances, the Legislature may see fit to amend the Insurance Act and sanction its use in this Province.

It would seem that even in England and other countries its introduction into fire insurance is the exception and not the rule, never being operative therein except so expressed and then only in the policy containing it: Griswold's Fire Underwriters' Text Book, Revised Edition, sec. 366.

I think the appeal should be allowed.

LISTER, J.A.:—

I agree with my brothers OSLER and MACLENNAN.

*Appeal dismissed*, BURTON, C.J.O.,  
and MOSS, J.A., *dissenting*.

R. S. C.

Judgment.

MOSS, J.A.

UNION BANK V. MORRIS  
UNION BANK V. CODE.

*Company—Shares—Issue at a discount—Payment for Services—Transfer—Certificate—R.S.C. ch. 119, ss. 27, 48, 55.*

Where shares in a company incorporated under the Dominion Joint Stock Companies' Act, R.S.C. ch. 119, were applied for, and the applicants paid to the company an amount equal to the face value of the shares, but at the same time received from the company a portion of the price as alleged consideration for services to be rendered by them to the company at a future date, it was held, in a judgment creditor's action, that the shares, to the extent of the amounts so allowed, must be treated as unpaid shares.

Judgment of MACMAHON, J., affirmed.

Where, without any transfer in writing being executed, certificates of shares issued under the above circumstances were surrendered by the original holder to the company, and new certificates were issued at his request by the company to the alleged transferee, it was held, having regard to section 48 of the Act and the by-laws of the company, that the original holder had not divested himself of liability to a judgment creditor of the company suing under section 55 of the Act. Judgment of MACMAHON, J., reversed.

Statement.

APPEALS by the plaintiffs in the first case, and by the defendant in the second case, from the judgments of MACMAHON, J., at the trial.

The following statement of the facts is taken from the judgment of MOSS, J.A.

There is really little dispute as to the facts, but as I am compelled to differ from some of the learned trial Judge's conclusions I deem it but proper that I should state the facts as they appear to me upon the record.

The plaintiffs are judgment creditors of The Anderson Trading Company (Limited), a company formed under the provisions of the Companies' Act, R.S.C. ch. 119; and an execution against the company having been returned unsatisfied they are suing the defendants in this action, under sec. 55 of the Act, to recover from them the sum of \$1400 which they allege is unpaid in respect of 34 shares of the capital stock of the company.

They allege that the defendant W. D. Morris acquired 34 shares of the capital stock of the par value of \$100 per

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share, and that the sum of \$1400 remains unpaid in respect of them. Also that W. D. Morris asserts that prior to the commencement of the action he transferred the 34 shares to his co-defendant, who is his wife; but the plaintiffs say such transfer, if made, was not *bonâ fide*, and that, notwithstanding the same, the defendant W. D. Morris is still the true owner of the shares and his co-defendant has no beneficial interest in them, but holds them as trustee and for the benefit of W. D. Morris; but if she is the true owner, then she is liable to pay the sum of \$1400 to the plaintiffs.

The defendants' main defence is that the shares are fully paid up, but they also assert that they were absolutely and *bonâ fide* transferred by W. D. Morris to his co-defendant for valuable consideration without notice of any claim in respect of them, and that she became and is the purchaser thereof upon the faith of certificates and representations made that the shares were fully paid up and unassessable.

The learned trial Judge held that the shares were not fully paid up but that they had been *bonâ fide* and absolutely transferred by W. D. Morris to his co-defendant before the commencement of the action and that therefore he was not liable, and that there was no evidence that when the co-defendant took them she had any notice that they were not actually paid up and that, therefore, she was not liable.

The capital stock of the company under its charter and supplementary charter amounted to 720 shares of \$100 each, of which there remained unissued in the month of April, 1894, either 56 or 52 shares. In that month some correspondence took place between Isaac Anderson, the president of the company, and the defendant W. D. Morris, with reference to the acquisition by the latter of shares in the company. This was followed by W. D. Morris coming to Toronto and holding conferences with Anderson and M. D. Barr, the manager of the company,



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on the 14th and 15th of April, 1894. The result of these conferences appeared to be that W. D. Morris was willing to take 52 shares, paying therefor the sum of \$3000 and receiving them as fully paid up shares, but nothing was concluded owing to Morris wishing to return to Ottawa and consult about it. He consulted Mr. R. G. Code, a solicitor practising in Ottawa, who advised against going into the arrangement on the ground apparently that it was unlawful for the company to issue its shares at a discount, and that there would be doubt as to the shares being fully paid up if taken in the manner spoken of in Toronto.

On the 1st of May, 1894, Barr came to Ottawa and met Code and Morris. He was told that Morris was not disposed to carry out the transaction as originally talked of, and then, according to Code's evidence, he was consulted about a new arrangement being carried out. It was then agreed that Code should become a subscriber for 18 shares, and then Barr divided it up in that way, Morris agreeing to take 34 shares and Code 18 shares, nominally at their par value.

And in order to give the appearance of their having paid for them in full in cash Morris drew his cheque upon the Bank of Ottawa at Ottawa, dated the 1st of May, 1894, payable to the Anderson Trading Company, for \$3400, and Code drew his cheque upon the Molson's Bank at Ottawa, dated the 1st of May, 1894, payable to the Anderson Trading Company, for \$1800. At the same time Barr drew two cheques upon the Union Bank of Canada at Toronto, dated the 1st of May, 1894, payable to himself or order, one for \$1400 and the other for \$800, and signed them as follows: "The Anderson Trading Co., Limited, M. D. Barr, manager."

That for \$1400 he endorsed in blank and handed to Morris, together with the company's stock certificate stating that Morris was entitled to 34 shares of the capital stock of the company, and that for \$800 he endorsed in

blank and handed to Code, together with a certificate that he was entitled to 18 shares of the capital stock of the company.

In return he received from Morris his cheque for \$3400 and from Code his cheque for \$1800. Each of these gentlemen also signed in the stub or counterfoil of the stock book a receipt in the following terms: "May 1st, 1894. This is to certify that I have this day received [thirty-four] [eighteen] shares of the capital stock of the Anderson Trading Company (Limited), amounting to [\$3400] [\$1800]."

The cheques given by Barr to Morris and Code were by them deposited to their own credit in their respective banks and were in due course forwarded to Toronto. They were there countersigned by Anderson, the president of the company, and were paid out of the company's funds.

Barr brought back to Toronto the cheques he had received from Morris and Code, and on the 3rd of May deposited them to the company's credit and they were in due course forwarded to Ottawa and paid.

The result was that to the extent of \$2200 they were paid out of the proceeds of the cheques given by Barr to Morris and Code on the 1st of May, and the company in fact only received \$3000 for the 52 shares.

The names of Morris and Code were entered in the list of shareholders on the first page of the company's ledger as holders to the extent of \$3400 and \$1800 respectively. On page 219 of the ledger appears an entry of "W. D. Morris, capital a/c.," debiting him with stock \$3400 and crediting him with cash \$3400. On page 220 there is an entry of "R. G. Code, capital a/c.," debiting him with stock \$1800 and crediting him with cash \$1800. Cash and journal entries also appear to correspond.

The transaction of the two cheques given to Morris and Code does not appear in the books in the form in which it was actually carried out, but is screened in the following entries. In the minutes of a meeting of the

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directors held on the 3rd of May, 1894, at which Anderson, the president, and Barr, the manager, were present, this entry appears: "Motion made by F. R. Lalor, seconded by John Sharp, that the sum of twenty-three hundred dollars be paid to Isaac Anderson as compensation for his services on behalf of the company to May 1st, 1894. Carried."

Of the sum so purported to be voted to him Anderson actually received \$100 which it was considered was owing to him for commission on sale of shares. The remaining \$2200 were represented by the two cheques for \$1400 and \$800 respectively given to Morris and Code, and in Anderson's ledger account he is debited with these cheques under date of May 1st, as well as with the \$100, and is credited by profit and loss \$2300. Cash and journal entries are also made, clearly for the purpose of covering up the fact that these cheques went to Morris and Code.

Code subsequently attended shareholders' meetings, representing himself and W. D. Morris under proxy from him on two occasions, and representing himself and Mrs. Morris under proxy from her on another occasion.

On the 15th of August, 1894, Code, acting under instructions from W. D. Morris, appears to have handed the latter's share certificate to the company and received back seven share certificates, viz., one for four shares and six for five shares each, all in the name of the defendant Mrs. Morris. The certificate issued to Morris is now produced attached to the stub of the certificate book with the words "Cancelled, August 16th, 1894," written upon its face, but by whom or in whose handwriting does not appear.

Shortly afterwards Morris handed the seven certificates to Mrs. Morris who looked at them and then returned them, for safe keeping as she says, to her husband. Morris says he intended to transfer them to his wife in repayment of a sum of money advanced to him soon after their marriage.

The by-laws of the company provide [No. 19] for the issue of stock certificates by the company to each share-

holder and to each purchaser or assignee of stock when demanded, provided all calls have been paid thereon, "and the assignee or purchaser upon surrendering to the secretary of the company the shares of stock so transferred or assigned shall be entitled to receive new stock certificates issued to him, or to whom he shall appoint, but no assignment of stock not fully paid up shall be binding upon the company until accepted by the Board of Directors and all calls made in respect thereof have been paid."

By-law No. 20: "Certificates of stock shall be issued in consecutive numerical order and a record shall be kept of all transfers or assignments of stock in the stock transfer book of the company."

By-law 21 gives a form of certificate with blank transfer endorsed on the back.

By-law No. 23: "The holder of any stock certificate may transfer or assign the same by any form of assignment in writing, but no assignment or transfer shall be binding upon the company until notice thereof in writing has been given to the treasurer of the company and such transfer accepted by the Board of Directors, and not then until all calls have been paid thereupon."

The certificate issued to Morris for the 34 shares is in the exact form given in by-law No. 21. But the transfer on the back has not been filled in or executed, nor does it appear that any form of assignment in writing was executed, and the minute book of the company fails to shew that a notice in writing of any assignment or transfer of the 34 shares was given to the treasurer, or that any such transfer was accepted by the Board of Directors. Nor is there evidence *aliunde* of compliance with these requirements of the by-laws.

Although by-law No. 20 speaks of a stock transfer book of the company no such book has been produced and so far as appears none was kept as required by sec. 43 (2) of the Companies' Act.



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No change was made in the list of shareholders on the first page of the company's ledger nor in Morris's capital account on page 219. So that, except so far as the production of the certificates goes, there is no record of any assignment or transfer of his shares by Morris to Mrs. Morris.

By section 27 of the Companies' Act, every share in this company is to be deemed to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same has been otherwise agreed upon or determined by a contract duly made in writing and filed with the Secretary of State at or before the issue of such shares. There is, of course, no pretence of such a contract in this case, but the contention is that the whole amount of the shares was paid in cash. In form this would appear to be the case, but it is not questioned that of the \$3400 entered to Morris' credit on p. 219 of the ledger, \$1400 were supplied by the company's cheque to him.

Thus it appears that the giving to the company of a cheque for \$3400 was merely a form adopted in order to give the appearance of having paid to the company the whole amount of the shares.

But the defendants say that the \$1400 cheque given to Morris was received by him in consideration of services to be performed by him for the company, and to perform which he was employed by Barr on behalf of the company at the time of the transaction of the taking of the shares. Morris's account of what took place with reference to the \$1400 appears in his evidence at the trial.

After Barr had been informed by Code and Morris on the 1st of May that Morris would not go into the arrangement proposed at Toronto, there was considerable discussion about the matter. Barr seemed to think that there was no doubt about the shares being fully paid up, but Morris did not agree with him. He drew Barr's attention to the fact that, after thinking the matter over,

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there might be some doubt as to the shares being paid up. What then took place is thus stated by Morris: "So then he went on to say that he had engaged to bring out another scheme to assist the company to increase their capital, called the Renting or Merchants' Supply Company, which he was then trying to float. . . I was to solicit capital to go in to carry out the objects of the company for selling and renting of cash registers. I was to get \$1400 for my influence in that direction. For that \$1400 I was to endeavour to the best of my ability to interest capital. . . . Mr. Barr was very anxious to float the Merchants' Supply Company, because he considered at the time that if the Merchants' Supply Company could be formed, and that if I could assist him in the matter, it would be of very great value to him, and he would pay me \$1400 for that work, and I was agreeable. Q. That \$1400 being the difference between the amount you had agreed to pay and the face value of your shares? A. It so happens to be that exact amount. Q. But was that the reason why \$1400 was fixed? A. I suppose he may have put it that way. What I mean by that is that that is the way he may have looked at it."

Barr's account is: "Q. You have told us the first arrangement in Toronto with Mr. Morris was to pay \$3000 for \$5200 of stock. Now, you have told us that they gave you cheques to the amount of \$5200. I want to know if that was the completion of the bargain? A. The question of how we should arrange the difference between \$3000, which they had offered for the stock, and \$5200 came up, and Mr. Code said that he could be of very great assistance to us in arranging with the Customs to fix the duties on American made machines in such a way that we would be better protected in the manufacture of machines in Canada, and stated, as near as I can remember the words, that this rebate could apply in payment of services which he could render with

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the Customs. Mr. Morris was to attempt to form a renting company, that said company would purchase from us cash registers and rent them to the users, and that \$1400 was to be paid to him to be used in connection with the formation of the renting company. That was the understanding arrived at at that meeting as to the \$2200. Q. And do I understand that that was an arrangement made to get over the difficulty of the payment of the difference between the amount offered in cash for the shares and the face value of the shares? A. That was the arrangement for that purpose. Q. And what was the arrangement as to how that difference should be paid? A. I gave these two cheques, one to Mr. Code and one to Mr. Morris."

It need only be added that Barr had received no authority to make any such arrangements for employing either Code or Morris in the way suggested, that there is no agreement in writing between these gentlemen and the company, that there is no trace of any entry or minute of such a transaction in the company's books, that the giving to them of the cheques was concealed under the resolution of the directors on the 3rd of May, and that the company never received any substantial services in return for them.

The appeals were argued before OSLER, MACLENNAN, MOSS, and LISTER, J.J.A., on the 2nd and 3rd of February, 1900.

#### UNION BANK V. CODE.

*Watson*, Q.C., and *J. B. Noble* for the appellant. The shares in question had been issued before and transferred to the company, and the company could deal with them as they pleased. Even if the issue now in question is treated as the first issue the plaintiffs fail. There was an actual payment of money in good faith by the company to Code in consideration of services which he agreed to render and the repayment of this money to the company by Code. The shares therefore must be held to be paid up shares and there is no liability. It must be admitted that a com-

pany may make an agreement for future services, and the time for payment for those services is a question merely of the financial convenience of the company; in other words, it is a matter of internal management, and if the company choose to pay in advance creditors cannot complain however ill-advised the course taken may appear to be. The distinction is that an agreement to render services and to be paid for them is not available, but an agreement to render services and actual payment, even though it be payment in advance, is: *Kent's Case* (1888), 39 Ch.D. 259; *Ferrao's Case* (1874), L.R. 9 Ch. 355; *Bentley's Case* (1879), 12 Ch.D. 850; *Spargo's Case* (1873), L.R. 8 Ch. 407; *Larocque v. Beauchemin*, [1897] A.C. 358. The adoption by the company of the liability as a present obligation, and the immediate discharge of that obligation by payment, are acts which a creditor, who in an action of this kind claims only through the company, cannot question; *McCracken v. McIntyre* (1877), 1 S.C.R. 479; *Page v. Austin* (1884), 10 S.C.R. 132, at p. 149; *In re Jones, Lloyd & Co.* (1889), 41 Ch. D. 159; *Adamson's Case* (1874), L.R. 18 Eq. 670. There is nothing in our Act to correspond with sec. 38 of the Imperial Act, which gives creditors special rights. *White's Case* (1879), 12 Ch. D. 511, has been relied on, but it does not apply, for there there was an agreement to do work in the future, to be paid for in the future, and no present liability. Sec. 27 of our Act is based on sec. 25 of the Imperial Act and deals with registration, not with manner of payment: *In re Almada and Tirito Company* (1888), 38 Ch. D. 415; *Ooregum Gold Mining Company v. Roper*, [1892] A.C. 125; *Welton v. Saffery*, [1897] A.C. 299.

*D. W. Saunders*, and *E. C. Cattanaeh*, for the respondents. The general principles applicable to this case are not in dispute, but the appellant cannot on the evidence bring his case within those of them to which he appeals. There was not here a payment in good faith for future services, but an issue of shares at a discount, and an



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attempt to cover up that illegal transaction by an elaborate system of set-off and fictitious entries. Payment must be made out, and to constitute payment there must be a handing over of money or its equivalent, or the setting-off of an actual liability of the company to the shareholder. See, in addition to the cases cited by the appellant, *North-West Electric Company v. Walsh* (1898), 29 S.C.R. 33; *Scales v. Irwin* (1874), 34 U.C.R. 545. When Code gave his cheque for the alleged payment there were not funds to meet it, and this fact is not without significance in dealing with the question of the validity of the transaction: *Eastwick's Case* (1876), 45 L.J. Ch. 225.

*Watson*, in reply.

#### UNION BANK v. MORRIS.

*D. W. Saunders*, and *E. C. Cattnach*, for the appellants. For the reasons given in the preceding appeal, the respondent, *W. D. Morris*, in this case must be held to have been, at the time of the alleged transfer of the shares in question to his wife, liable to creditors of the company as a holder of shares not paid up in full. That liability he has not succeeded in getting rid of. No transfer has in fact been made, and the only effect of the transaction has been to make *Mrs. Morris* liable as well as himself. *Mrs. Morris* is not a transferee in good faith, and cannot successfully contend that she took the shares as paid up shares. The certificates issued in her favour do not say that the shares have been paid up, and even if they did, that statement would at most operate as an estoppel only as against the company: *Burkinshaw v. Nicolls* (1878), 3 App.Cas. 1004; *Williams v. Colonial Bank* (1888), 38 Ch.D. 388; *Smith v. Walkerville Malleable Iron Co.* (1896), 23 A.R. 95; *In re Halifax Sugar Refining Company* (1891), 7 T.L.R. 293.

*Watson*, Q.C., and *J. B. Noble*, for the respondents. Only the actual holder can be liable, and if *Morris* is the

holder he is, for the reasons already given, a holder of paid up shares, while if Mrs. Morris is the holder, she is, even if the shares be treated as in fact not paid up shares, protected as a *bonâ fide* transferee. In either view the plaintiffs fail.

Argument.

*Saunders*, in reply.

May 15th, 1900. The judgment of the court was delivered by

Moss, J.A. :—

#### UNION BANK V. MORRIS.

The whole transaction was conceived in order to get over, if possible, the legal incapacity of the company to issue its shares at a discount and to endeavour to relieve or release these shareholders from their liability to pay the whole amount of their shares in cash, and that is a liability which, as observed by Lord Davey in *Welton v. Saffery*, [1897] A.C. at p. 329, even the company cannot release or relieve the shareholder from.

The course adopted precludes the defendants from saying that they did not agree to take shares generally, but only to take paid-up shares. Morris agreed to take the shares, knowing that he could not legally purchase them from the company at a discount, and that the whole amount must be paid in cash. He could only discharge himself from his obligation by shewing that the whole amount was so paid, and in this I think he has failed.

The form of the certificate does not assist him. It does not state that the shares have been fully paid up, even if that would be of any advantage to him in the face of his knowledge of the actual facts. And the same may be said with regard to the entries in the books. The answer is to be found in Lord Davey's remark in delivering the opinion of the Judicial Committee in *North Sydney*

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*Investment and Tramway Company v. Higgins*, [1899] A.C. at p. 272, dealing with a similar statutory provision : "Nor can their Lordships hold that the acceptance by the directors of Cliff's receipt was an acknowledgment of payment in cash, and, even if it were, the question under the statute is whether cash has been paid, and not whether a receipt has been given or payment has been acknowledged."

The defendants urged that the shares were not treasury shares or shares belonging to the company, but shares which had been issued to other persons previously, and by them returned to the company for the purpose of enabling it to raise money upon them. But the evidence of Barr and Curry, and the list of shareholders given on the first page of the company's ledger, establish beyond doubt that they were treasury shares.

I therefore agree with the learned trial Judge in his conclusion that the shares were not paid in full.

But I differ from his conclusion that the defendant W. D. Morris is not now liable.

Having agreed to take the shares and become the holder of them as he did, he remains liable until he can shew that there is a transferee of his upon the register who could be made liable in respect of these shares.

Now, the defendant W. D. Morris has never executed a transfer of his shares, nor has there been any compliance with by-law No. 23. And he has failed to shew compliance with the provisions of section 48 of the Companies' Act.

He has failed to place Mrs. Morris in a position by means of which she could become a shareholder in respect of his thirty-four shares, and in the list of shareholders and in the capital account he still remains registered as the holder of these shares. The certificate is not the title, but evidence of the title, to the shares, and the assumed act of cancellation, there being no assignment or transfer, does not divest the title to the shares: *Société Générale*

*de Paris v. Walker* (1885), 11 App. Cas. 20; *Roots v. Williamson* (1888), 38 Ch.D. 485; *Smith v. Walkerville Malleable Iron Co.* (1896), 23 A.R. 95.

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MOSS, J.A.

And the apparently unauthorized issue of the seven certificates to Mrs. Morris can create no difficulty so far as W. D. Morris is concerned; as between the defendants and the company they work no estoppel, and there is nothing to prevent the true facts from being shewn as they have been. See *Bishop v. Balkis Consolidated Co.* (1890), 25 Q.B.D. at p. 521.

The result is, in my opinion, that W. D. Morris remains liable for the \$1400 unpaid in respect of the shares issued to him.

The appeal should therefore be allowed as to him, and judgment should be entered against him for the amount claimed with costs. The appeal should be dismissed as against Mrs. Morris with costs.

*Appeal allowed in part.*

#### UNION BANK V. CODE.

The only question in this case is whether the defendant has established that the whole amount of the eighteen shares of the capital stock of the Anderson Trading Company, Limited, issued to him on the 1st of May, 1894, has been fully paid in cash.

And for the reasons indicated in the judgment in *Union Bank v. Morris*, I think he has failed, and that the judgment entered against him should not be disturbed.

The appeal should be dismissed with costs.

*Appeal dismissed.*

R. S. C,

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## INCE V. CITY OF TORONTO.

*Municipal Corporations — Highways — Damages — Ice — Negligence —  
“Gross Negligence” — R.S.O. ch. 223, s. 606 (2).*

“Gross negligence” in section 606 (2) of the Municipal Act, R.S.O. ch. 223, means at the least “great negligence,” and when it is attempted to make a municipal corporation responsible in damages under that sub-section for an accident caused by ice on a sidewalk, it must be shown that the sidewalk was allowed to remain in a dangerous condition for an unreasonable time.

If the sidewalk has been constructed in accordance with the plans of competent engineers, and is in good repair, the possibility of an improved or less dangerous plan of construction is not an element to be considered in deciding the question of the municipality’s gross negligence.

Where there was a sudden change in temperature about six in the morning and ice then formed on the sidewalk in question, it was held that the municipality, in the absence of actual notice of its dangerous condition, were not liable in damages for an accident which happened about eleven o’clock on the same morning.

Judgment of FALCONBRIDGE, J., reversed.

## Statement.

APPEAL by the defendants from the judgment at the trial.

The action was brought by the widow of one T. H. Ince to recover damages because of his death, caused by a fall on the crossing or sidewalk on the west side of Yonge Street across Richmond Street, in the City of Toronto.

The action was tried before FALCONBRIDGE, J., who held that, on the facts mentioned in the judgments, a case of negligence had been made out, and gave judgment in the plaintiff’s favour for \$3000.

The appeal was argued before BURTON, C.J.O., OSLER, MACLENNAN, and LISTER, JJ.A., on the 15th and 19th of September, 1899.

*Fullerton*, Q.C., and *W. C. Chisholm*, for the appellants.  
*Aylesworth*, Q.C., and *C. A. Moss*, for the respondent.

May 15th, 1900. BURTON, C.J.O.:—

This is an action brought by the widow of the late Mr. Ince to recover damages for the loss of her husband,

who was killed by falling upon a crossing on Richmond Street in this city, which it is alleged was out of repair by reason of the negligence of the defendants in allowing snow and ice to accumulate upon it or to be thrown or shovelled upon it by its servants, rendering it unsafe for the public using it.

On the Friday and for one or two previous days it had been very wet and stormy; a good deal of snow and sleet had fallen, which froze during the night of Friday, rendering the streets generally throughout the city very slippery and dangerous on the morning of the accident, and particularly so at the point where the accident occurred in consequence of the incline or slope which, according to some of the evidence, was unusually steep.

Evidence was offered and received at the trial to show that the slope was unusual and that the original construction of the crossing was defective, although it was constructed by an engineer employed by the city of well-known repute, and approved of by Mr. Keating, who was for many years the city engineer, a gentleman of great experience in road making, who found it in its then condition when he assumed office, and who considered no change necessary.

It is at the present day well understood that in every case the liability of a body created by statute must be determined upon a true interpretation of the statute under which it is created. There would be no liability at common law in a case like the present by reason of the highway being out of repair.

The Municipal Act, under which the defendants are created, provides that "every public road, street, bridge and highway shall be kept in repair by the corporation, and on default of the corporation so to keep in repair, the corporation, besides being subject to any punishment provided by law, shall be civilly responsible for all damages sustained by any person by reason of such default:" R.S.O. ch. 223, sec. 606 (1).

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BURTON, C.J.O.

The evidence so received could only be admissible for the purpose of showing that the crossing as originally constructed was so defective as to come within the very liberal interpretation which has been placed by the courts here on the words "kept in repair," but of that there is no pretence; on the contrary, it is proved by several experienced witnesses to have been properly constructed, and even those who disapproved do not pretend to say that except in the case of its being covered by ice it would be dangerous to travel on, or that it was so constructed as to allow water to accumulate upon it. The only defect, if defect it could be called, was that being on a slope instead of being level it was naturally more dangerous than it otherwise would have been. I quite concede that if there was any defect constituting a want of repair, it would be no answer to say "We employed a competent engineer"—the statute imposes an absolute obligation to keep the road in repair.

The question therefore (if we pass over for the moment the suggestion that the labourers employed by the city had thrown out a quantity of snow and ice from the gutter upon the crossing) is whether there was any want of diligence on the part of the corporation in taking steps to remove the snow and ice or to render it less dangerous by putting ashes, sand, or other substance upon the street.

In a case like the present, where the freezing has been preceded by a rain or snow storm extending over the whole city, it can scarcely be expected that the attention of the authorities will be as prompt and immediate as where they have notice of a defect at a particular spot, but the enquiry is whether under all the circumstances of the case those who were bound to keep the crossing in repair are justly chargeable with negligence and want of reasonable care.

If the witnesses are to be believed, the labourers were sent out at about seven in the morning with sand, but the slippery condition of the streets was not confined to this

spot but was very general, and they say they did sprinkle sand over the crossing at this point—it may have been blown away by the wind or removed by women's dresses; and it may be said they should have used a pick to roughen the ice, but the defendants are only liable for gross negligence. Whatever that may mean, I think it can scarcely be applied to them in this instance; it would be too harsh a requirement in a climate like ours, and would almost be tantamount to making them insurers.

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It is quite true that a number of people had fallen at the same spot in a previous winter, but there is no evidence that the city authorities had notice of it, and even if they had it would be of no legal significance. The ice which caused the fall of the deceased was a new and independent formation of which it was necessary that the city should have notice before any liability would attach; nor do I think that the fact that policemen had notice of it can fix the city with notice until they were communicated with.

But it is said that the accident was due to the labourers, employed by the city to clear the gutter, shovelling the snow and slush therefrom upon the crossing. If that had been established, the plaintiff's case would possibly have been made out, but there is no evidence to sustain that position, but a mere suggestion by parties who were not present at the time that the crossing presented that appearance. The corporation ought not to be made responsible on a mere surmise of that kind when the parties engaged in the work expressly deny it, and it would seem to be a most improbable thing to do.

On the whole, whilst my sympathies go with the unfortunate lady who has sustained this loss, I find myself unable to hold that a case of actionable negligence has been made out. The appeal should, I think, be allowed.

OSLER, J.A. :—

The street crossing where the deceased met with the accident which caused his death being a sidewalk within the



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OSLER, J.A.

meaning of section 606 (2) of the Municipal Act, according to the decision of the Supreme Court of Canada in *Kingston v. Drennan* (1897), 27 S.C.R. 46, the plaintiff was bound to prove that it was out of repair at the time in question by reason of the gross negligence of the corporation, inasmuch as the above sub-section enacts that no municipal corporation shall be liable "for accidents *arising* from persons *falling* owing to snow or ice upon the sidewalks, unless in case of *gross* negligence by the corporation."

"Gross" must be used here in the sense of at least "great" negligence, according to one of the common meanings of the word.

Of such negligence I am unable in this case to find any clear evidence.

I cannot take into consideration the method in which the sidewalk—so to call it—was constructed. That method was adopted on the deliberate judgment of competent engineers, having regard to the lie of the land, the intersection of the streets, and the fall necessary to give the gutters their proper depth: *London v. Goldsmith* (1889), 16 S.C.R. 231. As constructed, and apart from the conditions caused by snow or ice thereon, it was in a complete state of repair and not dangerous to passers thereon.

The evidence establishes, to my mind, that these dangerous conditions did not arise until the morning of the accident, when a sharp frost set in, turning to ice the half-melted snow and sleet which had been on the sidewalk on the previous day and night. Whether this had been thrown there by the city's servants while engaged in cleaning out the gutters, or was due to natural shifting or movement of the snow on the road caused by cutters or other vehicles passing over the "sidewalk," the evidence does not enable me to say, but considering that the sidewalk at the place in question served also the purpose of a street-crossing, it seems to me to be a place where snow or ice might naturally be expected to be or to be placed,

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differing in this respect from that part of the street dedicated to the walk by the side of the lots or houses thereon. Even if it be taken that the slush had been shovelled out of the gutters by the city's servants, I should not attach importance to that fact as an element of negligence, and the question really is whether the sidewalk had been allowed to remain in the dangerous condition in which it undoubtedly was when the unfortunate deceased fell thereon, for an unreasonable time. This was at 10.30 o'clock or 11 o'clock in the morning. Was it gross negligence on the part of the city not to have had something done between 6 or 7 o'clock and that time to make this spot less unsafe? Considering the extent of the work which had to be done on that day over the streets of the city, rendered necessary by the sudden change in the weather, it does appear to me that it would be imposing a very heavy burden upon municipalities, and depriving them altogether of the benefit of the recent enactment, if we were to hold that a lapse of four or five hours before anything was done at the place in question to lessen its dangerous state was sufficient to fasten upon them the existence of gross negligence at the time of the accident. It might be otherwise if there were evidence of actual notice having been given to defendants earlier in the day of the necessity for immediate attention to this dangerous place. No such evidence appears in the record. I am not aware that the city can be affected by the inaction of policemen in this respect, which seems to be suggested in the reasons against appeal. Had a policeman given notice, the city might have been unable to say that the notice was insufficient, if policemen had been requested generally to give information as to defects on the street, but that is not to say that the city is affected by their omission to do so.

MACLENNAN, J.A. :—

After a careful perusal of the evidence, I am led, with great respect, to differ from the conclusions of my learned

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J.A.

brother Falconbridge, and to hold that the charge of negligence against the defendants is not made out.

Apart from snow and ice upon the crossing, where the unfortunate accident occurred, I think it is impossible to say that there was any want of repair of the highway. Municipalities are not required to construct or maintain their streets according to an ideal standard of perfection. What the law enjoins is that they shall be kept in repair. The meaning and extent of that obligation has in many cases been held to be that the road or street shall be reasonably safe for the use of the public, having regard to all the circumstances. It was said by some of the witnesses that the crossing in question was structurally faulty, inasmuch as the slope from the crown at the centre of Richmond Street, southward to the gutter, was greater than it ought to be. But no witness said, and I think it clear it could not be said, that, in the absence of ice and snow, there was the slightest danger to persons using the crossing by reason of the alleged excess of grade. Yonge Street, along the west side of which this crossing lies, is itself upon a descending grade. The crossing was constructed in 1892, and had been in use more than four years before the accident. It had been constructed under the superintendence of skilful and experienced engineers, and, as said by Ritchie, C.J., in *London v. Goldsmith* (1889), 16 S.C.R. 231, with reference to a difference of level between a sidewalk and a crossing: "I think it would be most unreasonable to hold that because, in the opinion of an engineer, the grade could be slightly reduced, the street should be held to be out of repair."

It is clear that in this case the accident was caused by snow and ice on the crossing. There had been a considerable fall of snow for two or three days before the accident, which occurred about 11 a.m. on the 23rd of January. There had been some thaw the day before, followed by hard frost during the night and in the morning. The crossing appears to have been thronged by pedestrians all morning,

and was unquestionably very slippery, by reason of ice and snow, when the deceased fell and was injured. It is proved that many other persons, besides the deceased, slipped and fell at the same spot. The statute, R.S.O. ch. 223, sec. 606 (2), declares that no municipal corporation shall be liable for accidents arising from persons falling owing to snow or ice upon the sidewalks, unless in case of gross negligence by the corporation. In *Drennan v. Kingston* (1896), 23 A.R. 406, and (1897) 27 S.C.R. 46, it was held that a crossing such as this was a sidewalk, within the enactment, and that gross negligence meant very great negligence. The question in the case, therefore, is whether there is evidence of very great negligence, on the part of the defendants, in not repairing this slippery spot on the crossing. The evidence is that the effect of the weather, during the previous day and night, was that on the morning of the accident the sidewalks and crossings everywhere were slippery. Isabella Rogers fell at the same place where Mr. Ince fell, about 7.30, and broke her wrist, and she says that all the crossings were slippery; the sidewalks also, but not so bad as the crossings. That was about a quarter of an hour before sunrise. Francis Abbey fell at the same spot about 8.30, and from that time until the accident in question, several other persons fell at or about the same spot; and some also upon the northern slope of the same crossing. There is a city by-law, which requires citizens to remove ice and snow from the sidewalks in front of their premises; but the crossings being part of the roadway, used equally by sleighs and other vehicles as well as by pedestrians, are apparently not within the by-law. It is nevertheless the duty of the city to see that crossings are not in a condition, by reason of snow or ice, dangerous to pedestrians: *Drennan v. Kingston* (1896), 23 A.R. 406; (1897) 27 S.C.R. 46, and the evidence is clear that for some of the time between 7.30 in the morning until the accident to Mr. Ince, this crossing, at the spot where he fell, was in a dangerous condition. The fact, however,

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that many persons slipped and fell, would seem to shew that the danger was not very noticeable in itself. If it were obvious to those passing by, they would avoid it; and the inference is that only those who slipped themselves, or who saw others do so, would necessarily become aware that the place was dangerous, until expressly notified. The only evidence of notice to the city is, that one Hurst, about ten o'clock, notified a constable that a woman had slipped on the crossing, and that about the same time the constable himself saw a man slipping. The constable immediately went to the station, and had notice sent to the commissioner's office, with the result that by twenty minutes before noon the crossing was sprinkled with sand. It is not shewn that this service could reasonably have been performed in a shorter time, and if not, it cannot be said that the city was guilty of any negligence after the notice given to the constable. The city commissioner, being called as a witness on behalf of the plaintiff, says that he had occasion to walk up Yonge Street about ten o'clock, and to pass over this crossing. He says he observed it to be like all others, rough and slippery. He observed more or less sand on every one of them, all the way from King Street to Queen Street, saw it upon this crossing, but apparently none then on the south slope. He was not asked, and he does not say, whether he observed that the place was dangerous, and I think the inference from his evidence is that he did not. He was on his way to the City Hall to keep an appointment, and was not observing the crossings particularly, and his attention was not called to them particularly, and he noticed nothing unusual. He says the notification of the dangerous condition of the crossing was received at his office about eleven o'clock, or a few minutes after. He further says that there was an arrangement in his office for men to go along the streets, on slippery mornings, to "sand the streets," by which I understand him to mean, the sidewalks and crossings, and that they began their work between seven

and eight o'clock, beginning with King and Yonge Streets, which are the streets which are most travelled. Several witnesses were called by the city, who proved that on that morning they began about seven o'clock, with a team and a load of sand, going along several streets, including King Street and Yonge Street, sprinkling the crossings with sand, and about eight o'clock sprinkled the crossing in question. Another witness, a corporation labourer, testifies that on the same day, about half-past nine, he picked this crossing over with a pick so as to roughen it, and then sprinkled sand over it, and this evidence is corroborated in the most distinct manner by the plaintiff's witness Hurst. He says that about 9.20 he saw a man sprinkling sand there, but he says it was on the centre of the crossing—north of the dangerous place—and he did not notice that he sprinkled any on the incline. He saw him put on a couple of shovelfuls. He will not say he did not sprinkle the crossing right to the south side.

I am of opinion, therefore, that the crossing where the accident occurred had been sprinkled with sand at about 8 o'clock and again about 9.30; that there was no notice to any officer of the defendants that the place was dangerous until about 10 o'clock, when the attention of the constable was directed to it, and that it cannot be said that there was gross, that is, very great negligence on the part of the defendants in not making the crossing safe before the accident occurred. It was proved that a strong wind was blowing during the morning, from the west, over the crossing, the effect of which probably was to blow the sand off more or less, and that the same effect might have been produced by the dresses of women passing by.

Upon the whole, I am constrained to differ from the conclusion arrived at by my learned brother, and to decide that the action ought to be dismissed.

LISTER, J.A. :—

I agree.

*Appeal allowed.*

R. S. C.

Judgment.  
MACLENNAN,  
J.A.

## EVES v. BOOTH.

*Dower—Husband and Wife—Separation Deed—Jointure—Election—27 Hen. VIII., ch. 10, sec. 7.*

On the 24th of July, 1868, the plaintiff and her husband and trustees on her behalf executed a deed which, after reciting that disputes had arisen between the husband and wife and that an action for alimony was pending, provided for the separation of the husband and wife and the conveyance of certain property by the husband to trustees for the benefit of the wife, and contained a number of covenants, one of which was a covenant by the trustees "that the said (wife) will, whenever called upon, release her dower in any lands of which he, the said (husband), may hereinafter (*sic*) acquire a title." The husband died in January, 1898, having acquired, and at the time of his death seized of, other lands, and in August, 1898, the wife brought this action claiming dower in these lands, having up to that time continued to have the beneficial use and possession of the lands mentioned in the deed of 1868:—

*Held*, that the deed of 1868 provided a jointure for the wife within the provisions of sec. 7 of 27 Hen. VIII., ch 10; that the acceptance of the deed and the benefits thereby conferred was an election by her within that Act to accept the jointure; and that, therefore, she was not entitled to dower in the after acquired lands.

Judgment of a Divisional Court, 30 O.R. 689, affirmed.

## Statement.

AN appeal by the plaintiff from the judgment of a Divisional Court [ARMOUR, C.J., and STREET, J.], reported 30 O.R. 689, was argued before BURTON, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, J.J.A., on the 16th and 17th of May, 1900. The facts and the authorities relied on are stated in the report below.

*Geo. Wilkie*, and *J. E. Irving*, for the appellant.

*A. Hoskin*, Q.C., for the respondent.

June 29th, 1900. The judgment of the Court was delivered by

MACLENNAN, J.A.:—

I am of opinion that the judgment is right.

The validity of separation deeds has long been established by the highest authority: *Wilson v. Wilson* (1848), 1 H. L. C. 538; *Vansittart v. Vansittart* (1858), 2 DeG. & J. 249; 4 K. & J. 62; *Hunt v. Hunt* (1862), 4 DeG. F. & J.

221; *Besant v. Wood* (1879), 12 Ch. D. 605; *Cahill v. Cahill* (1883), 8 App. Cas. 420. Such deeds were usually made with the intervention of trustees by and with whom covenants were made on behalf of the wife. These covenants were and are regarded in equity as the covenants of the wife herself. See *per* Brett, M.R., p. 799, and *per* Lindley, L.J., p. 810, *Fearon v. Aylesford* (1884), 14 Q.B.D. The power of the wife to contract in such deeds is, however, no doubt not unlimited, but is subject to the qualification expressed by Sir W. Page Wood, V.-C., in *Vansittart v. Vansittart*, quoted with approval by Lord Selborne in *Cahill v. Cahill*. When the present deed was made, a married woman could bar her dower in any lands by joining with her husband in a deed or conveyance thereof in which a release of dower is contained: C.S.U.C. ch. 84, sec. 4, and it may be doubtful, having regard to *Cahill v. Cahill* and *Vansittart v. Vansittart*, whether a mere covenant by the wife, even in a separation deed, would be effectual as to lands subsequently acquired.

But this deed, while providing for a separation, also provides a jointure for the wife within the provisions of the statute 27 Hen. VIII., ch. 10. The husband conveys to trustees for her an estate of freehold for her life, besides the other provisions for her benefit, and that is one of the considerations for which she and her trustees covenant that she shall release her dower. By section 7 of that Act such a jointure is good, although made after marriage; and it is good in equity, although not at law, the conveyance not being made to herself but to trustees for her. But the same section gives to the wife the right, after the death of her husband, to elect between the jointure and her dower; and that is the difficulty, and the only difficulty, which the defendant had to overcome in this case. It will be said that the plaintiff has elected in favour of her dower; for her husband died on the 18th of January, 1898, and she brought her action for dower on the 30th of August, within a reasonable time. But while the wife may elect after the

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death of her husband, there is no time limited for her doing so. She has not so many days, or months, or a year, within which she may do so; what is said is that *she may refuse* to have and take the lands, etc., and thereupon demand her dower. She has not refused to take the lands, she retained them for seven months after her husband's death, she retains them still, has never refused, does not now refuse, to take them, or offer to restore them to the defendant, who is her husband's devisee. Being in the possession and enjoyment of the land, she was bound to act promptly in making her election, if she determined to claim her dower; and not having done so, I think she must be taken to have elected in favour of the jointure.

But I see no reason why a wife may not make her election during the coverture, where as here she takes the jointure immediately in possession. She has had the beneficial use and possession of the land for thirty years. She elected to do so by the separation deed, and I think there is nothing in *Vansittart v. Vansittart*, or *Cahill v. Cahill*, to prevent her as part of the consideration for the separation thereby agreed to by her husband, and the other benefits thereby granted to her by him, from then and thereby making her election.

Upon the whole therefore, and upon the ground that both by the separation deed itself, and by her retention without refusal of the use and benefit of the jointure after her husband's death, the plaintiff has elected against her dower, I think her action fails, and was properly dismissed.

*Appeal dismissed.*

R. S. C.

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## STEWART V. SNYDER.

*Executors and Administrators—Notice to Claimants—R.S.O. ch. 129, sec. 38—Limitation of Actions—Trustee Limitation Act—Reversionary Interest—R.S.O. ch. 129, sec. 32—Trustee Relief Act—62 Vict. ch. 15 (O).*

A notice by executors that "all parties indebted to the estate of the late (testator) are required to settle their indebtedness" by a named date, and that "parties having claims against said estate are also required to file same by said date," is not a sufficient notice within section 38 of R.S.O. ch. 129 to protect the executors from liability for claims not brought to their knowledge until after the estate has been distributed by them.

Their liability in this respect extends to claims against their testator for money lost owing to a breach of duty by him as trustee.

Persons having a reversionary interest in a trust fund may bring an action to compel the trustee to make good money lost owing to his negligence, and the Trustee Limitation Act, R.S.O. ch. 119, sec. 32, does not run against them from the time of the loss but only from the time their reversionary interest becomes an interest in possession.

After judgment had been given in the Court below against the executors in this case, the Act for the Relief of Trustees, 62 Vict. ch. 15 (O.), was passed:—

*Held*, that, assuming the Act to apply to such a case, it did not relieve the executors, for they could not be held to have acted reasonably when they failed to follow the plain statutory directions as to notice to creditors and claimants.

Judgment of STREET, J., 30 O.R. 110, affirmed.

APPEAL by the defendants Snyder and Hagey from the judgment of STREET, J., reported 30 O.R. 110.

Statement.

The appellants were the executors of the estate of one Levi Snyder, who died in the year 1890. He was himself then the surviving executor of the estate of one Abraham C. Clemens, who died on the 28th of August, 1872, having made a will dated the 25th of April, 1872. By that will Clemens, after making certain specific devises, gave the residue of his estate "unto my five children to have and to hold the same unto them and to their heirs and for their use: and I hereby order that my estate be divided into five equal shares, and that each have and receive share and share alike.

"I order with regard to my son Moses Clemens' share that my executors shall pay the interest of the same as it comes into their hands yearly to Elizabeth Clemens, the

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wife of my son Moses Clemens, during her lifetime, and at her decease, and if my son Moses Clemens survive her, it shall then be paid to him during his life, and at his decease or the decease of his wife, if she survive him, the said share shall then be divided equally among the children of my son Moses Clemens, share and share alike, or to their or either of their heirs if deceased."

The plaintiffs were the children of Moses Clemens and Elizabeth Clemens, and brought the action on the 11th of May, 1898, to compel the appellants to make good "and bring into Court" the sum of \$3,100, part of the share of Moses Clemens received by Levi Snyder, and misappropriated by Snyder's agent, Martin. The facts in reference to this part of the case are stated in the report below. Moses Clemens died in the year 1892; his widow, Elizabeth Clemens, was living when the action was brought, and was a defendant.

The appeal was argued before BURTON, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 16th of November, 1899.

*E. E. A. DuVernet*, for the appellants. The judgment proceeds upon the erroneous assumption that the appellants are entitled, subject to their mother's life estate, to the fund in question. But on the true construction of the will of Abraham C. Clemens this is not so. The share is given to Moses Clemens, subject possibly to beneficial interests in favour of the plaintiffs, but he and he alone was the person entitled to the *corpus*, and the statute has long since barred his right or the right of any one claiming through him. But even if the plaintiffs take directly under the will, they are not entitled to the relief given them. The breach of trust, if there was one, occurred in 1880, and the plaintiffs are in this dilemma—either they were entitled to sue then and their right is barred, or they were not, and are not yet, entitled to sue, and their action is premature. Even if Levi Snyder and his estate were liable, the appellants are protected. They never received

any portion of this fund; they knew nothing of any claim to it; they do not represent the Clemens estate; and they published a proper notice before distributing their testator's estate. To hold that the notice is insufficient is to penalize the appellants because of the omission of perhaps usual but immaterial and unnecessary words. The statute does not say that anything is to be inserted as to the consequences of failure to send in claims, and this is reasonable, for the fact that notice is given is itself a warning to all persons that the estate is about to be distributed, and that any claim must at once be made. At any rate, the Act, 62 Vict., 2nd Sess., ch. 15 (O.), passed after judgment was given below, applies and protects these executors, who have acted in good faith and reasonably.

*M. Houston*, and *R. M. Thompson*, for the respondents. Levi Snyder had possession of the fund in question, and by his gross negligence allowed it to be made away with; apart from any limitation, therefore, as to his liability to the persons entitled to that fund there is no question; and the limitation does not apply, for the plaintiffs have no interest in possession; nor are they in a dilemma. They have never had a right to possession, and therefore are not barred, but they have an interest in the fund, and therefore can sue to have it made good. The will gives no interest to Moses Clemens; his share is spoken of, it is true, but that is to identify it, and the title to it is in Elizabeth Clemens and the plaintiffs. Levi Snyder's liability became a liability of the appellants when they proved his will; and as they have, knowing of his connection with the Clemens estate, chosen to distribute his assets without taking reasonable precautions or following the statutory directions, they have not escaped from that liability. The statute and the rules point out clearly what the notice to creditors and claimants should contain, and this notice falls far short of what is needed. The recent Act is retroactive, it is true, but it does not apply to a case which has passed into judgment. But even if it



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does, it does not protect the appellants, who have chosen to disregard plain statutory directions, and cannot be held to have acted reasonably.

*Du Vernet*, in reply.

June 29th, 1900. BURTON, C.J.O.:—

The judgment of my brother Street should, I think, be affirmed.

It is clear that Levi Snyder was responsible for the moneys left in the hands of Martin, who misappropriated them, and that so long as he was alive he could not have been heard to set up the Statute of Limitations against any claim by these plaintiffs, for whom he was trustee. The liability of his executors does not depend upon any new *assumpsit*, but originates from and depends entirely on the liability of their testator. The plaintiffs are not even yet entitled to the possession of the fund, and could not maintain any action to recover the amount to which, upon the death of Elizabeth Clemens, they will be entitled, but I do not agree with the contention of the appellants that the respondents are therefore in a dilemma. Although not entitled to sue for the recovery of the amount until her death, it is clear, I think, that they can maintain an action against the executors, as they could have done against the testator, to make good the loss and to bring the money into Court, and the Statute of Limitations would be no answer to such a claim.

There are some Irish decisions apparently opposed to this view, but they have not been followed in England—see *Brittlebank v. Goodwin* (1868), L.R. 5 Eq. 545—and they are not applicable to a suit of this nature, which is merely to make good to the trust estate property which has been misappropriated and not a suit for the recovery of the money claimed by the plaintiffs.

I agree that the notice to creditors was insufficient, and for the other reasons mentioned in the judgment I think it should be affirmed and the appeal dismissed.

OSLER, J.A. :—

Judgment.

OSLER, J.A.

So far as the case of the executors is concerned, and they are the only appellants, I am unable, after giving it the fullest consideration, to discover any sufficient reason to interfere with the judgment of the learned trial Judge. I agree with his reasoning and conclusions on that part of the case. Had the evidence admitted of it, I should have felt no difficulty in holding that the executors might have invoked the protection of the recent Act—An Act to amend the law respecting the liability of trustees, 62 Vict., 2nd Sess., ch. 15 (O.)—which was passed after the judgment in appeal was delivered, but which is expressly retrospective in its terms, and may be applied to relieve trustees even though the transaction found to be a breach of trust occurred before the passing of the Act: *Quilter v. Mapleson* (1882), 47 L.T.N.S. 561; *In re Gillespie and Toronto* (1892), 19 A.R. 713. But one of the conditions on which the trustees' claim to relief must be founded is here wanting, for it is impossible to hold that their conduct in the administration of their trust has been reasonable.

As regards the defendant Mrs. Clemens—against whose right the Statute of Limitations has been held to be a bar, so that though the trustees have been ordered to replace the fund for the benefit of the plaintiffs, the remaindermen, they are declared to be themselves entitled to the interest thereon, which should otherwise have gone to the life-tenant of the fund—she is not an appellant and I therefore offer no opinion whether as to her the case has been properly disposed of. If it has been, there is (to my mind at all events) a certain grotesque injustice in the operation of section 32 of the Trustee Relief Act, R.S.O. ch. 129, upon the rights of a person in her situation.

The appeal of the executors must be dismissed.

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MACLENNAN, J.A. :—

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Levi Snyder, at his death in 1890, left a large estate, with only trifling debts, and if his assets were still in the hands of the defendants, his executors, there could be no question of the right of the plaintiffs to recover the fund in question out of those assets in preference to the claims of the legatees. The executors, however, divided the estate among the legatees in 1891, and as they allege, without notice of the present claim, and they contend that, under those circumstances, the judgment should have been *de bonis testatoris*, and not a personal judgment, as it is. The first question is whether that contention is entitled to prevail.

Apart from the effect of the Trustee Act, R.S.O. ch. 129, sec. 38, I think it is clear that the defendants are not excused or protected by the want of notice. Ever since the time of Lord Hardwicke, it has been the doctrine of courts of equity that it is no answer to a claim for a debt that the executor has divided the assets among the legatees or next-of-kin without notice or knowledge of the debt. The claim might be barred by laches, or by the Statute of Limitations, or perhaps by conduct on the part of the claimant which was inequitable as between himself and the executor; but mere ignorance of the claim was no defence, unless where distribution was made by order of the Court: *Hawkins v. Day* (1753), Ambler 160; *Norman v. Baldry* (1834), 6 Sim. 621; *Smith v. Day* (1837), 2 M. & W. 684; *Knatchbull v. Fearnhead* (1837), 3 M. & Cr. 122; *March v. Russell* (1837), 3 M. & Cr. 31; *Hill v. Gomme* (1839), 1 Beav. 540; *Low v. Carter* (1839), 1 Beav. 426; *Underwood v. Hatton* (1842), 5 Beav. 36; *Waller v. Barrett* (1857), 24 Beav. 413. The law is thus stated in the last (10th) edition of Lewin on Trusts, at p. 1111: "An executor or administrator of a trustee will be answerable for a breach of trust, though he may have distributed the assets amongst the legatees or next-of-kin

without previous notice of the breach of trust, unless it was done under the sanction of the Court, or under the provisions of the Law of Property Amendment Act, 1859, 22 & 23 Vict., ch. 35, sec. 29 (e)." The Act here referred to is similar to our Act, R.S.O. ch. 129, sec. 38. See also 2 Williams on Executors, 9th ed., pp. 1693 and 1206. In this case there was a breach of trust by Levi Snyder in allowing the part of the fund which has now been lost to remain uninvested in the hands of his clerk or agent Martin. See *Kilbee v. Sneyd* (1828), 2 Mol., at p. 199; *Wyman v. Paterson* (1900), 16 T.L.R. 270; *Wynne v. Tempest* (1897), 13 T.L.R. 360.

It was next contended that, before distributing the estate, the defendants had availed themselves of the statute, R.S.O. ch. 129, sec. 38, by publishing the notice there directed to be given, and were entitled to protection. On this point I agree entirely with the judgment of my brother Street that the notice was not sufficient. The notice which the Court requires to be published in administration proceedings, is prescribed by Rule 701, and I think the notice published by the defendants was not a compliance with the Act.

It was also contended that the action was barred by the Statute of Limitations; but that defence also fails. Apart from R.S.O. ch. 129, sec. 32, there is no statute barring an action for a breach of an express trust, and this case is clearly not within section 32. The plaintiffs are suing to have the trust fund restored. Their interest in it is reversionary, and has not fallen into possession, and they are within the very words of the saving clause at the end of sub-section 1 (b), which declares that the statute "shall not begin to run against any beneficiary unless and until the interest of such beneficiary becomes an interest in possession."

Another argument, which was made by Mr. DuVernet, was that by the terms of the will the father of the plaintiffs, and not the executors named in the original will,

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was the trustee, because by the first part of the 6th clause he gives the share of his estate now in question to the father. I think this argument was resorted to by Mr. DuVernet in desperation, for the testator's meaning is made quite clear in the second part of the clause, in which he directs the executors to pay the interest of that same share to the mother and father successively for life, and at the death of both to pay the share itself to the plaintiffs.

The recent Act, 62 Vict., 2nd Sess., ch. 15 (O.), was also invoked. That Act was passed on the 1st of April, 1899, after the judgment now in appeal, which was on the 3rd of December, 1898. The first question is whether the Act can or ought to be applied by this Court to a case which had passed to judgment before the Act came into force. Assuming it to be applicable, as to which see *Quilter v. Mapleson* (1882), 47 L.T.N.S. 561, I do not think these executors acted reasonably, or ought fairly to be excused for their breach of trust. They both knew that their testator had been an executor of the original testator. John Snyder had the clearest knowledge, for he was a borrower of money from the executors, paying them interest for ten years, on a mortgage, and obtaining a discharge from his father as surviving executor. Hagey admits that he must have heard of it, as everybody else did. They were both nearly related to the original testator and to the plaintiffs by marriage. The defendant John Snyder is a son, and the defendant Hagey a son-in-law of the executor Levi Snyder, and the plaintiffs' mother is his sister. I think they did not act reasonably in not complying with section 38 of the Act. I think it would be most dangerous to hold that an executor acted reasonably, and ought fairly to be excused, if he distributed the assets among the beneficiaries without taking the steps, always taken by the Court and by careful executors, to give an opportunity to creditors and others having claims on an estate to bring forward their claims. In the present case the widow received her interest regularly, not only during the lifetime

of the two original executors and the lifetime of the survivor, and usually by the hands of Martin, but also for six years after the present defendants had divided Levi Snyder's estate. She and her family resided in a distant part of the country, and could have no reason to think or suspect that the trust fund was in any danger or was lost. The hardship to her and to the plaintiffs to lose the fund, by the distribution of the estate without their knowledge, would be very great indeed if the defendants were to be excused for omitting to take the usual steps which, at all events, might have enabled them to bring forward their claims. See *In re Stuart*, [1897] 2 Ch. 583; *In re Kay*, [1897] 2 Ch. 518; *In re Turner*, [1897] 1 Ch. 536; *Wynne v. Tempest* (1897), 13 T.L.R. 360; *Perrins v. Bellamy*, [1899] 1 Ch. 797.

The widow's claim as tenant for life has been barred by the judgment; but as she has not appealed against it, we are not called upon to express any opinion upon that part of the judgment.

The appeal must therefore be dismissed.

MOSS, and LISTER, JJ.A., concurred.

*Appeal dismissed.*

R. S. C.

Judgment.  
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J.A.

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## HIGGINS V. TRUSTS CORPORATION OF ONTARIO.

*Executors and Administrators—Mortgage—Purchaser of Equity of Redemption—Indemnity—Death of Mortgagor—Release of Purchaser.*

The administrators of the insolvent estate of a deceased mortgagor are not liable in damages to his mortgagee as upon a devastavit, because they release the purchaser of the equity of redemption in the mortgaged property from his liability to indemnify the mortgagor in respect of the mortgage, no claim having been made upon them by the mortgagee in respect of the mortgage.

Judgment of BOYD, C., 30 O.R. 684, affirmed.

## Statement.

AN appeal by the plaintiff from the judgment of BOYD, C., reported 30 O.R. 684, was argued before OSLER, and LISTER, J.J.A., and FERGUSON, J., on the 9th of February, and 4th of April, 1900. The facts are stated in the report below, and the line of argument and the authorities relied on are there given.

*R. U. McPherson*, and *G. C. Campbell*, for the appellant.

*Aylesworth*, Q.C., and *J. H. Moss*, for the respondents.

June 29th, 1900. The judgment of the Court was delivered by

OSLER, J.A. :—

The important facts in the case are that one Echlin conveyed certain lands to the plaintiff by way of mortgage, covenanting to pay the plaintiff the amount thereby secured, \$1,150 and interest.

Echlin then conveyed the equity of redemption to Hodgins, the conveyance being expressed to be made subject to the plaintiff's mortgage.

Echlin afterwards died, and the defendants, the Trusts Corporation, were appointed administrators of his estate.

The estate being insolvent, and no claim having been made thereon by the mortgagee, the administrators, at

Hodgins' request, executed a release of his implied obligation to indemnify his vendor against the plaintiff's mortgage.

The estate is now being administered under a decree for administration obtained in an action brought by the plaintiff against Hodgins and the Trusts Corporation.

The estate, as I have said, is insolvent, and by the report of the Referee it appears, and is not disputed, that the trifling assets which came to the defendants' hands, except as to \$171.30 allowed for costs of administration, have been duly administered.

The plaintiff filed no claim with the administrators before the distribution of the assets, and in the administration proceedings waived any claim against the defendants in respect of such assets, but he charged that the defendants had committed a devastavit in releasing Hodgins' implied obligation to indemnify the intestate and his estate against the plaintiff's mortgage, and contended that they were bound to compel Hodgins to pay it for his benefit, or, as he claims in his pleading, that he was entitled to an assignment of the mortgage in order that he might himself sue Hodgins thereon.

So far as our Provincial Courts are concerned, I think it is settled that, living the mortgagor, the mortgagee cannot enforce against the purchaser of the equity of redemption any covenant or obligation which the latter has entered into with the mortgagor to indemnify him against his liability to the mortgagee to pay the mortgage moneys: *Canada Landed Investment Co. v. Shaver* (1895), 22 A.R. 377, and the cases there cited, particularly *Woods v. Huntingford* (1796), 3-Ves.-128, and *In re Errington*, [1894] 1 Q.B. 11, and upon the best consideration I have been able to give to the question, and the numerous authorities cited by Mr. McPherson and Mr. Campbell in their very able arguments, I am quite unable to perceive how the death of Echlin, the mortgagor, works any change in the right of the plaintiff to reach, or to avail himself of,

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Hodgins' obligation towards the mortgagor to indemnify the latter or his estate against the plaintiff's mortgage. That obligation was not entered into or assumed for the benefit of the plaintiff, nor was the deceased mortgagor in any sense a trustee of it for him, or bound to enforce it for his benefit or to assign it to him. On the death of the mortgagor, the plaintiff's right was to prove his claim against the assets of the estate in the hands of the defendants, the administrators, available for the benefit of creditors generally; and so far as that estate might be diminished by being applied in discharge of the mortgage, it would be the duty of the administrators towards the general body of creditors, or those interested in the estate after creditors were satisfied, to call upon the purchaser of the equity to make good his obligation to indemnify it.

But, inasmuch as the estate has not been, and now never can be, affected by the plaintiff's claim, how does the duty of the administrators to enforce the obligation arise? There can be none towards the general body of creditors, who have sustained no loss, and equally I think there can be none towards the plaintiff, who never had any legal or equitable interest in it.

On the whole, it appears to me that the judgment of the learned Chancellor is right, and that the appeal should be dismissed.

*Appeal dismissed.*

R. S. C.

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## CLARK V. BELLAMY.

*Executors and Administrators—Negligence—Agent's Fraud—Limitation of Actions—Trustee Limitation Act—R.S.O. ch. 129, sec. 32.*

Executors, relying in good faith on the statement of their testator's solicitor that he had in his hands securities sufficient to answer a fund they were directed by the will to invest for an annuitant, distributed the estate. Subsequently it was found that before the testator's death the solicitor had misappropriated the money given to him by the testator to invest, and had, in fact, at the time of the representation, no securities or money in his hands :—

*Held*, that the executors were protected by the Trustee Limitation Act, R.S.O., ch. 129, sec. 32.

*Held*, also, that payments made from time to time by the solicitor to the annuitant, ostensibly as of interest received by him from the fund, did not keep alive the right of action against the executors.

Judgment of STREET, J., 30 O.R. 532, reversed.

AN appeal by the defendants from the judgment of STREET, J., reported 30 O.R. 532, was argued before MACLENNAN, MOSS, AND LISTER, JJ.A., on the 14th of March, 1900. The facts are stated in the judgments and in the report below.

Statement.

*S. H. Blake*, Q.C., and *J. W. St. John*, for the appellant Riseborough.

*R. T. Harding*, for the appellant Bellamy.

*Clute*, Q.C., and *W. A. Skeans*, for the respondent.

June 29th, 1900. MACLENNAN, J.A. :—

I am of opinion that we ought to allow the appeal on the ground that the action was brought too late, and is barred by the limitation section 32 of the Trustee Act, R.S.O. ch. 129.

The testator died on the 14th of February, 1889. The defendants proved his will on the 11th of March following, and on the 8th of March, 1890, under the belief that the solicitor, Badgerow, had in his possession mortgages belonging to the estate for the sum of \$5000, which the will required to be invested to answer the plaintiff's life annuity, the executors distributed the remainder of the

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estate, amounting to about \$6000, among the other legatees—the children of the testator. The defendants left the whole business in Badgerow's hands, and he paid interest to the plaintiff from time to time until his death on the 31st of July, 1892, as if the \$5000 had been duly invested, and as if such interest had been collected by him. It was soon afterwards discovered that Badgerow had been guilty of fraud, and that the supposed mortgages for \$5000 had no existence whatever, either at the time of the testator's death or at any time afterwards.

The present action was brought against the defendants on the 10th of June, 1897, and it is to compel the defendants to make good the sum of \$5000 which they ought to have invested as directed by the will instead of distributing it among the other legatees. The defendants contend that inasmuch as the action is brought more than six years after the time the money was distributed by them it is barred by the statute; and the question is whether that is so.

The case is clearly not within the exception in the section 32 (1), as a claim founded upon any fraud or fraudulent breach of trust to which the defendants were party or privy, or to recover trust property, or the proceeds thereof, still retained by them, or previously received by them and converted to their own use. There has been no fraud on the part of the defendants, nor is there any trust property in their hands, nor have they converted any such property to their own use. The action being brought against them as trustees, they are entitled to the benefit, so far as applicable, of sub-sections (a) and (b) of section 32 (1). The recovery sought against them is a sum of \$5000, and interest thereon, and that is the relief which has been granted. The \$5000 is not the sum which was falsely represented by Badgerow to have been invested in mortgages, for no such investment existed; but it is the \$5000, part of the \$6000 or thereabouts, which was improperly distributed among the children. The interest which the

defendants have been ordered to pay is not interest which has been received by the defendants, or which has in any way accrued, but it has been ordered by way of damages to make good the breach of trust committed by the defendants..

Judgment.

MACLENNAN,  
J.A.

I am unable to distinguish this case from that of *How v. Earl Winterton*, [1896] 2 Ch. 626, in which the Court of Appeal affirmed a judgment of Kekewich, J. In that case the plaintiff was entitled under a will to a rent charge of £50 a year for life, payable half-yearly, which was to begin at the expiration of fourteen years from the death of the testatrix, who died on the 20th of May, 1875. Under the will it was the duty of the defendant, as trustee during the fourteen years, to receive the rents, to pay some annuities out of them, and to invest the surplus rents in the purchase of real estate, and until such purchase to invest and accumulate those rents at compound interest. The plaintiff's annuity was charged on the land thus to be bought, and on the fund to be accumulated in order to buy it, as well as on the lands devised to the defendant for other people. The plaintiff's annuity was paid by the persons beneficially entitled to the real estate on which it was charged, but in the year 1894 prior mortgagees intervened and the plaintiff's annuity ceased to be paid. She brought her action on the 9th of August, 1895, and sought an account of the rents which the defendant ought to have accumulated, and to make the defendant responsible for any deficiency in the fund which, if he had done his duty, would have been available for the annuity. The defendant had acted honestly, but mistakenly, and had, instead of accumulating the rents so as to form a fund for the plaintiff's annuity, applied them in keeping down interest on incumbrances and in necessary repairs. It was held that there could be no account of money received and improperly paid away by the defendant more than six years before the action, and that the plaintiff's right was confined to money received within six years, including sums



Judgment.  
MACLENNAN,  
J.A.

which had accrued due before, but had been received afterwards. Kekewich, J., who tried the action, and Lindley and Lopes, L.JJ., rested their judgment upon clause (b) of the Act, and Rigby, L.J., upon both (a) and (b), but preferably upon clause (a). Now in that case the defendant had actually received sums of money, which it was his duty by the will to retain and accumulate in order to answer the plaintiff's annuity. He paid them away improperly, but not fraudulently, more than six years before action, and the action as to those sums was held to be barred. That is exactly the present case. The defendants received \$6000, of which it was their duty to retain and invest \$5000 for the plaintiff's annuity. They did not retain it, or invest it, but improperly, yet not fraudulently, paid it away, more than six years before action. I think the action was brought too late.

It was, however, contended that inasmuch as Badgerow had paid the plaintiff interest on the \$5000 from time to time until the 1st of May, 1892, a date within six years before the action, these payments took the case out of the statute. I do not think so. The action is not brought for debt; nor were the sums paid by Badgerow interest on a debt. The cause of action is the wrongful parting with the trust fund on the 8th of March, 1890. How can the payments made by Badgerow be an acknowledgment of that cause of action within six years? The principle on which the payment of part or payment of interest is held to take the case out of the statute is that it is an acknowledgment of the debt, and a new promise to pay it, a principle which is here inapplicable.

It was also contended that the defendants are estopped by the payments from denying the existence of the investments which it was their duty to make, and also that the plaintiff's want of knowledge of the breach of trust until within six years excluded the bar of the statute. I do not think there are any grounds for applying the doctrine of estoppel; and the statute has not qualified the limitation of such an action by want of knowledge.

I think the appeal should be allowed, and the action should be dismissed with costs.

Judgment.

MACLENNAN,  
J.A.

I may say that I have hesitated a good deal in this case over the question whether this is not an action for a legacy, to which the limitation of ten years by virtue of section 23 of the Real Property Limitation Act is applicable: R.S.O. ch. 133; Banning on Limitations, 2nd ed., pp. 233, 4, 5; *Phillips v. Munnings* (1837), 2 M. & Cr. 309; *Bullock v. Downes* (1860), 9 H.L.C. 1; the plaintiff's claim being for an annuity, which is a legacy. And see *Roch v. Callen* (1848), 6 Ha. 531; *In re Ashwell's Will* (1859), Johns. 112; Sugden's Property Statutes, p. 138. I think, however, we are bound by the decision of the Court of Appeal in *How v. Earl Winterton*, which was also a case of an annuity given by a will, and therefore a legacy.

MOSS, J.A.:—

In her depositions put in at the trial the plaintiff expressly disclaimed all intention of imputing fraud or fraudulent breach of trust to the defendants, and it is beyond question that the defendants are not in possession of or retaining trust property or the proceeds thereof.

*Primâ facie* therefore the defendants are entitled to the benefit of section 32 of R.S.O. ch. 129, and to every cause of action alleged the Statutes of Limitations would be a complete bar. There is no reply specially setting up payments or acknowledgments to take the case out of the statute, but the learned trial Judge evidently dealt with the case without reference to any technical question.

I gather that he would have held the case within the protection of section 32 but for the view he took of the facts as to Badgerow's dealings after the testator's death. He was of opinion that the proper conclusion to be drawn was that the defendants appointed Badgerow their agent to manage and invest the \$5000 and to collect the interest on it and pay it to the plaintiff. He was also of opinion

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MOSS, J.A.

that the defendants told the plaintiff that they had done so, and that Badgerow would from time to time on their behalf pay to her the interest. And his conclusion was that Badgerow's payments by cheque to the plaintiff, on some of which appeared the statement that it was for interest on the \$5000, were payments made by the defendants, and that each payment was a renewal of the representation originally made by them to the plaintiff that a sum of \$5000 was in their hands for her benefit. So far as any effect is to be attributed to the statements on the cheques as representations made within six years before the action it may be noted that the last one that made reference to its being a payment of interest was dated May 1, 1891. There was nothing on any of the subsequent cheques except that of September 8, 1891, and the memo. on it does not on its face connect the defendants with the payment.

But, in my opinion, the evidence does not lead to the conclusion that Badgerow was appointed by the defendants to be their agent to invest the \$5000. In point of fact it was supposed by everyone, the plaintiff included, that Badgerow had during the testator's lifetime invested \$5000 in mortgages which were held for the plaintiff's benefit. He had been so instructed by the testator, who had told the plaintiff and the defendants that such was the case. And after the testator's death the condition of things existing at that time, whatever it was, was allowed to continue. This no doubt may have been a breach of trust on the part of the defendants, but it was an entirely different thing from appointing Badgerow their agent to invest. Nor was there any appointment of him as agent to collect the interest, save such as might be implied from permitting the existing state of things to remain. There was certainly no direction by the defendants to Badgerow to pay the interest to the plaintiff. The defendants deny giving any direction. Bellamy says that Badgerow's paying the interest direct to the plaintiff was not according to any understanding to that effect, and he did not know that he was going to do

so. He first learnt it from the plaintiff herself after Badgerow's death. The plaintiff was examined for discovery and stated that from the time her husband (the testator) told Badgerow to set apart the \$5000 for her down to the time of Badgerow's death she always believed it was properly invested, and, believing that, she did not go to the defendants for her interest, but went to Badgerow and he made the payments to her. There is here no evidence of authority from the defendants to Badgerow to make payments direct to the plaintiff. If he was authorized to collect interest at all he was only authorized to collect and pay it to the defendants, and the payments to the plaintiff cannot be treated as payments made to her by or on behalf of the defendants. They had no actual knowledge of the receipt of the interest and the payment of it to the plaintiff until she told them after Badgerow's death.

Judgment.

Moss, J.A.

Neither does the evidence support the view that the defendants represented to the plaintiff that they had appointed Badgerow their agent and that he would on their behalf pay her the interest. I have already referred to the evidence shewing how the plaintiff looked to Badgerow for payment of the interest, not because of anything told her by the defendants, but because of what she had always understood of the investment in the testator's lifetime. The plaintiff attaches weight to the fact that the defendant Bellamy received from Badgerow a statement or list of securities which the latter represented were those in which the \$5000 were invested and that he shewed this to the plaintiff. But the plaintiff perfectly understood what was meant by that list. She was not led to believe by that list, and did not believe, that the defendants had made an investment of the \$5000, or had done anything with it save leave it as was contemplated by all parties in the way in which the testator had placed it. There was no representation to the plaintiff of a new state of things which could or ought to induce her to suppose that the moneys



Judgment.

MOSS, J.A.

had been placed by the defendants in a different position from that which they were in at the testator's death.

Therefore, while there was a breach of trust there was no representation to the plaintiff on which she acted so as to estop the defendants from claiming the benefit of the statute after the lapse of six years.

I see no ground for saying that the defendants were guilty of any fraud, not even of that kind which has sometimes—though not very happily in the opinion of some of the Law Lords who heard *Derry v. Peek* (1889), 14 App. Cas. 337—been called legal fraud.

That being so, this case is not distinguishable from a number of cases decided under the section of the English Act corresponding to section 32 of R.S.O. ch. 129, notably *Thorne v. Heard*, [1893] 3 Ch. 530; [1894] 1 Ch. 599; [1895] A.C. 495; *How v. Earl Winterton*, [1896] 2 Ch. 626, and *Collings v. Wade*, [1896] 1 Ir. 340.

All parties were the sufferers from Badgerow's fraud, but he was no more the defendants' agent than he was the plaintiff's. At all events, in my opinion he was not the agent of the defendants so as to render them responsible for his fraudulent acts, which were done neither by their authority, nor with their privity, nor for their benefit.

I think the appeal should be allowed.

LISTER, J.A.:—

I agree with my brother MACLENNAN.

*Appeal allowed.*

R. S. C.

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## REGINA V. MURDOCK.

*Criminal Law—Conviction—Certiorari—Amendment—Criminal Code, sec. 889—Indian Act.*

Under section 889 of the Criminal Code, the Court, if a conviction under any Act to which the procedure in the Code applies, and for an offence over which the convicting magistrate has jurisdiction, is brought up by *certiorari* (whether in aid of a writ of *habeas corpus* or on motion to quash the conviction is immaterial) may hear and determine the charge as disclosed by the depositions upon the merits, and may confirm, reverse, vary, or modify the decision.

A conviction under the Indian Act, defective on its face, was amended by describing the offence accurately, and by substituting for imprisonment for six months and a fine of \$50 and \$5 costs, or imprisonment for a further term of six months in default of payment of the costs or in default of sufficient distress, imprisonment for six months and a fine of \$50 and \$5 costs or imprisonment for a further term of three months in default of payment of the fine and costs.

Judgment of STREET, J., affirmed.

AN appeal by the prisoner from the judgment of STREET, J., was argued before BURTON, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 15th of May, 1900. The facts are stated in the judgment.

Statement.

*E. E. A. DuVernet*, for the prisoner.

The Crown was not represented.

June 29th, 1900. The judgment of the Court was delivered by

OSLER, J.A. :—

On an information laid before Hugh Stewart, a justice of the peace and Indian agent at the Grand River Reservation, the prisoner was, on the 18th of September, 1897, convicted by and before the Indian agent "for that on the 16th September, 1897, he did take and bring on the Grand River Reservation spirituous liquors and did dispose of the same contrary to the provisions of the Indian Act." And he was adjudged for his said offence to be imprisoned in the common gaol of the County of Haldimand with hard labour for the term of six months. And he was also

Judgment.

OSLER, J.A.

adjudged "to pay to the Department of Indian Affairs the sum of \$50 and \$5 for costs in this behalf, and if the said sums for costs (*sic*) are not paid forthwith (or on or before the 29th September inst.) then I order that the said sum be levied by distress and sale of the goods and chattels of the said Joseph Murdock, and in default of sufficient distress I adjudge the said Joseph Murdock to be imprisoned in the said common gaol and kept there at hard labour for the term of six months, to commence at and from the term of his imprisonment aforesaid, unless the said sum for costs (*sic*) is sooner paid."

The information, depositions, and conviction, were returned upon a writ of *certiorari* issued in aid of a writ of *habeas corpus*. The gaoler's return to the latter writ shewed as cause of detention a warrant of commitment in the form of "warrant of commitment upon a conviction for a penalty," reciting a conviction for the offence as above described, and for a fine of \$50 and \$5 costs to be paid forthwith, and if not so paid, imprisonment for six months in the common gaol of Haldimand unless the said sums were sooner paid, and stating default in payment, but saying nothing of the penalty of imprisonment, or of imprisonment for non-payment of the fine in case of insufficient distress. The proceedings having been brought up on the return to the writs of *habeas corpus* and *certiorari*, the learned Judge, as we were told, at first ordered the prisoner to be discharged in consequence of the manifold defects in the conviction and commitment, but on further consideration determined to amend the conviction, and therefore ordered the prisoner to be remanded. The learned Judge's order, which is drawn up on reading "the answer" to the writ of *habeas corpus* and the warrant of commitment attached thereto, the conviction, depositions, and return to the writ of *certiorari* issued in aid, and the affidavits and papers filed on the application for the said writs, is in the following terms: "It is ordered that in lieu of the offence mentioned in the said conviction the said

Joseph Murdock be convicted for that he did on the 16th September, 1897, give a quantity of whiskey, being an intoxicant, to one Melinda Ann Morton on the Indian Reserve, called the Grand River Reservation, in the Township of Oneida in the County of Haldimand, and that the said conviction be amended accordingly. 2. It is further ordered that the said conviction be amended by adjudging that the said Joseph Murdock for his said offence be imprisoned in the common gaol of the said county and there be kept at hard labour for the term of six months, and that the said Joseph Murdock do forfeit and pay the sum of \$50 and \$5 costs of this prosecution, to be forthwith paid and applied according to law, and that in default of payment of the said fine and costs the said Joseph Murdock be imprisoned for a further term of three months, to begin at the expiration of said term of six months, unless the said several sums and the costs of committing and conveying to gaol be sooner paid."

Judgment.

OSLER, J.A.

The order concludes by directing the prisoner to be remanded into the custody of the Warden of the Central Prison (the officer to whom the *habeas corpus* had been directed) and that the process of the Court be issued for the purpose of enforcing the said conviction and order.

The motion for the prisoner's discharge upon the *habeas corpus* was renewed on the appeal on the ground of the defects apparent in the conviction and commitment, and it was further contended that the learned Judge had exceeded his powers in ordering the conviction to be amended or that he ought not to have amended it.

The 94th section of the Indian Act, R.S.C. ch. 43, substituted for the original 94th section by 51 Vict. ch. 22 s. 4 (D.), enacts that "every one who . . . directly or indirectly on any pretence or by any device sells, barter, supplies, or gives to any *Indian* or non-treaty Indian any intoxicant . . . or who sells, barter, supplies, or gives to any *person* on any reserve or special reserve any intoxicant, shall, on summary con-



Judgment.

OSLER, J.A.

viction before any judge, police magistrate, stipendiary magistrate, or two justices of the peace or Indian agent, upon the evidence of one credible witness other than the informer or prosecutor " . . . be liable (1) to imprisonment for a term not exceeding six months and not less than one month, *with or without hard labour*; or (2) to a penalty not exceeding \$300 and not less than \$50 with costs of prosecution; or (3) he shall be liable to both penalty and imprisonment in the discretion of the convicting judge, magistrate, etc."

The interpretation clause of the Act, s. 2, enacts that "unless the context otherwise requires: (c) The expression 'person' means any individual other than an Indian; . . . (h) The expression 'Indian' means: *First*, Any male person of Indian blood reputed to belong to a particular band; *Secondly*, Any child of such person; *Thirdly*, Any woman who is or was lawfully married to such person. (i) The expression 'non-treaty Indian' means any person of Indian blood who is reputed to belong to an irregular band, or who follows the Indian mode of life, even if such person is only a temporary resident in Canada."

In section 94, therefore, the expression "any person" means any individual other than an Indian, and thus, by force of other clauses of the interpretation section, includes a white man, woman, or child, a non-treaty Indian, and perhaps an enfranchised Indian, and as "Indian" includes any male person of Indian blood reputed to belong to a particular band, and his wife and children, all classes are practically within what may be called the prohibition of the section which as to "Indians" is absolute, and as to all others restricted to the selling, giving, etc., on the reserve.

The evidence, it may be said, amply proves that the defendant had given an intoxicant (as defined by clause (n) of the interpretation section) to one Melinda Ann Morton, the wife of one Henry Morton, on the Indian

Reserve, then known as the Grand River Reservation, in the Township of Oneida, in the County of Haldimand. Whether she was an "Indian" within the meaning of that section was not proved, but if she was not, she was nevertheless a "person" within the meaning of the section, and therefore, the intoxicant having been given to her on the Reserve, an offence was proved within section 94. This, no doubt, was what the magistrate intended to convict for, though he did not use the very words of the section in describing the offence, saying instead that the defendant "did take and bring on the Grand River Reservation spirituous liquors and did dispose of the same contrary to the provisions of the Indian Act."

This error was, in my opinion, having regard to the evidence, clearly amendable under the section of the Criminal Code, which I shall afterwards refer to.

In adjudicating upon the punishment, the magistrate, as we have seen, had power in his discretion to impose, as he did, both fine and imprisonment, and, as incident to the pecuniary penalty, the costs of the prosecution.

In this respect there is no error in the conviction. The mistake occurred in the adjudication of the method of raising or levying the penalty.

The 94th section of the Indian Act makes no provision for this.

Section 872 of the Criminal Code, 1892 (55-56 Vict. ch. 29) enacts that "whenever a conviction adjudges a pecuniary penalty, . . . whether the Act authorizing such conviction does or does not provide a mode of raising or levying the penalty . . . or of enforcing the payment thereof, the justice by his conviction after adjudging payment of such penalty . . . with or without costs, may adjudge: (a)—1. That in default of payment forthwith, or within a limited time, such penalty shall be levied by distress and sale of the goods of the defendant; and 2. If sufficient distress cannot be found, that the defendant be *imprisoned* in the manner and for the time directed by

Judgment.

OSLER, J.A.

Judgment.

OSLER, J.A

the Act authorizing such conviction or by this Act (*i.e.*, the Criminal Code), or for any period *not exceeding three months*, if the Act authorizing the conviction does not specify imprisonment or does not specify any term of imprisonment, unless the penalty and costs (if costs are ordered) are sooner paid: or (b) That in default of payment of the penalty and costs (if any), forthwith or within a limited time, the defendant be *imprisoned* in the manner and for the time mentioned in the 'Act under which the conviction is made' or for any period *not exceeding three months* if the Act does not specify imprisonment, or does not specify any term of imprisonment, unless the said sums (*i.e.*, penalty and costs) are sooner paid."

Sub-section 3 of section 872 also provides that where both fine and imprisonment are adjudged, the justice may in his discretion order that the imprisonment in default of distress or of payment shall commence at the expiration of the imprisonment awarded as a punishment for the offence: *Regina v. Cutbush* (1867), L.R. 2 Q.B. 379; *Regina v. Castro* (1880), 5 Q.B.D. 490.

In the exercise of his discretion the magistrate, instead of directly adjudging imprisonment in default of payment, appears to have intended to adopt the other alternative and to order the penalty and costs to be recovered by distress, and in default of distress, imprisonment. The printed form used, however, erroneously provides that "if the said sums for *costs* are not paid . . . then I order that the said sum be levied by distress and sale, etc."

And the term of six months' imprisonment in default of distress is imposed, which, if the magistrate's only authority is in section 872 of the Code, exceeds by three months the term mentioned therein.

Of the commitment, it is sufficient to say that it is not supported by the conviction, being simply a commitment for six months (*unless* sooner paid) for non-payment of a pecuniary penalty, saying nothing of the imprisonment adjudged for the offence nor of default of distress.

This was certainly not to the defendant's disadvantage.

Judgment.

The same may be said of the defect in the conviction in adjudicating distress for non-payment of the costs only, and in default of sufficient distress for the costs, then imprisonment for the term specified unless both sums—the penalty and costs—are sooner paid.

OSLER, J.A.

But this was also an amendable defect as I shall show.

It was said that there was no power to impose more than three months' imprisonment for non-payment of the fine or in default of distress, and if section 872 of the Code were the only provision on the subject that would no doubt be the case. That section, however, refers to the Act under which the conviction is made, and it is only where that Act is silent as to the term of the imprisonment that section 872 (b) necessarily comes into play. Among the numerous amendments which have been made to the Indian Act is that of 53 Vict. ch. 29 (D), by section 10 of which a section 135 and other sections are added to the Indian Act. That section enacts that "any offender sentenced by a magistrate or Indian agent under any provision of this Act or of any amendment thereof, to the payment of a penalty or of costs, or of both, shall, in default of payment, be liable to *imprisonment*, notwithstanding that such provision does not expressly authorize such imprisonment to be imposed in the event of non-payment of the penalty; but the term of such imprisonment shall not exceed that to which the offender may be sentenced for the offence."

Under this section, therefore, the magistrate could probably have adjudged the defendant to be imprisoned for six months in default of payment of the pecuniary penalty, that being the maximum period to which he might have been sentenced for the offence. On the other hand, as he adjudged the penalty to be levied by distress, and imposed imprisonment only in default of sufficient distress, I think that the maximum he could legally have imposed in that case was three months, because the Act under



Judgment.

OSLER, J.A.

which the conviction was made makes no provision for enforcing payment of the penalty in that manner, and section 872 (a) is alone to be regarded.

The conviction is, therefore, erroneous in this respect also.

Then as to the power to amend the conviction. This is now much more extensive than it formerly was. By section 889 of the Criminal Code, when a conviction has been removed by *certiorari*, it is not to be held invalid for any irregularity, informality, or insufficiency therein, if the Court or judge before whom the question is raised is, upon a perusal of the depositions, satisfied that an offence of the nature described in the conviction has been committed over which the justice has jurisdiction, and that the punishment imposed is not in excess of that which might have been lawfully imposed for the offence; and "even if the punishment imposed or the order made is in excess of that which might lawfully have been imposed or made," the Court or judge is declared to have, in Ontario, "the like powers in all respects to deal with the case as seems just, as are by section 883 conferred" upon the Court of General Sessions of the Peace upon an appeal thereto against the conviction.

These extensive powers of dealing with a conviction brought up on *certiorari* were first conferred by 53 Vict. ch. 37, s. 27 (D), up to which time the Court had never felt itself at liberty to interfere where any part of the punishment awarded or the method of raising or enforcing payment of the penalty had rested in the discretion of the justice. The effect of these two sections of the Code, however, now is that, if satisfied upon a perusal of depositions that an offence of the nature described in the conviction has been committed, the Court may hear and determine the charge upon the merits as disclosed by the depositions returned in the *certiorari*, and may vary, confirm, reverse or modify the decision of the justice or may make such other order as they think just, and may

by such order exercise any power which the justice might have exercised; and the conviction or order shall have the same effect and may be enforced in the same manner as if it had been made by the justice, or it may be enforced by the process of the Court itself: section 883.

In the case before us the conditions prescribed by section 889 for exercising the power of amendment exist. The conviction has been brought up by *certiorari* (whether in aid of the writ of *habeas corpus* or on motion to quash the conviction seems immaterial), and the depositions, reading them, as for this purpose they ought to be read, strictly, show that an offence was committed of the nature of that described in the conviction and over which the justice had jurisdiction. The defendant is convicted of that offence, which is now properly described; he has been ordered, as the justice ordered him, to be imprisoned therefor for the maximum period permitted by the statute, viz., six months; and he has been fined therefor \$50, as the justice also fined him, but, instead of adjudging that the fine shall be levied by distress, followed by imprisonment for six months in default of sufficient distress, the learned Judge has thought proper to adjudge imprisonment for the further term of three months only, and for non-payment simply, unless the fine and costs (which are ascertained by the order) be sooner paid. As I understand the effect of the amendment of 1890 of the Indian Act, the term of imprisonment for non-payment of the fine might have been as much as six months. On the whole I am of opinion that, though the original conviction was defective, the learned Judge had power to amend it as he has done, and that his order is not defective in any particular which has been urged against it.

The appeal must, therefore, be dismissed. See *Regina v. Dunning* (1887), 14 O.R. 52; *Regina v. Logan* (1888), 16 O.R. 335; *Regina v. Coulson* (1893), 24 O.R. 247.

I ought to add that in any warrant of commitment under which the defendant is to be committed for non-

Judgment.

OSLER, J.A.

Judgment.  
OSLER, J.A.

payment of the penalty, the costs of commitment and conveying to gaol must be ascertained and set forth, as they have not been ascertained in the conviction: *Rex v. Payne* (1824), 4 D. & R. 72; Paley on Convictions, 6th ed., pp. 281-2, 298-9, 350. Compare the forms of conviction and commitment in this particular as given in the Criminal Code.

The appellant's counsel has since the above was written handed in a copy of the judgment of the Divisional Court in *Regina v. Roche*, quashing a conviction for a breach of a transient-trader by-law. Nothing is said as to amending the conviction, and if the case is one in which the Court had power to amend, they did not exercise it. The by-law was passed under the authority of an Act of the Legislature, and it may be doubted—though as to this it is not necessary to express an opinion—whether the amendatory sections of the Criminal Code can, by force of R.S.O. ch. 90, be applied to support a summary conviction of that kind. And even if they do, it rather appears from the judgment that no offence was proved by the depositions over which the magistrate had jurisdiction, so that the main condition on which the power to amend depends was absent.

*Appeal dismissed.*

R. S. C.

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## KIMBALL V. COONEY.

*Will—Construction—Annuity—Interest on Fund.*

A testator by his will directed his executors "to, take as much of my estate and moneys to be put to interest as will make \$200 of interest per year, said amount of \$200 to be paid to my beloved wife . . . each and every year of her life, said \$200 to be paid by my executors to my beloved wife on the 1st day of January next after my decease, and every subsequent payment to be paid on the 1st day of January in each and every year thereafter. . . . At the death of my said wife said principal to be equally divided between my brothers." There were specific devises of some real estate and chattels, and the residue was not sufficient to produce \$200 a year :—

*Held*, affirming the judgment of a Divisional Court, that the widow was entitled to \$200 a year, and that the *corpus* of the estate should be resorted to if necessary for that purpose.

APPEAL by the defendant Lipsett from the judgment of a Divisional Court [ARMOUR, C.J., FALCONBRIDGE, and STREET, JJ.].

Statement.

The question involved in the appeal was the construction of certain provisions contained in the will of one Hugh Lipsett, who died on the 23rd of April, 1886. By his will, made the day before his death, he gave his wife "her choice" of certain articles of furniture, and then directed as follows: "And my executors are to take as much of my estate and moneys to be put to interest as will make two hundred dollars of interest per year, said amount of two hundred dollars to be paid to my beloved wife, Mary Ann Lipsett, each and every year of her life, said two hundred dollars to be paid by my executors to my beloved wife on the first day of January next after my decease, and every subsequent payment to be paid on the first day of January in each and every year thereafter. Also I bequeath to my wife aforesaid my watch and chain. At the death of my said wife, said principal to be equally divided between my brothers Robert and George Lipsett, of Manitoba, if alive; if not, each family of said Robert and George Lipsett to get said amount divided between each family that said Robert and George Lipsett should get if



Statement.

alive." He then gave several legacies and specific devises, and directed the "balance of my estate in cash, mortgages, notes, and bank account to be equally divided between my brothers Robert and George Lipsett, of Manitoba, as soon as possible after my decease."

The plaintiff was the widow of the testator, and the defendant Lipsett was a brother of the testator, and was appointed by the Court representative of the class to take at the widow's death. A number of questions were raised in the action, but the only point in question upon the appeal was whether she was entitled to an annuity of \$200 or only to the interest earned by the *corpus* of the estate in the hands of the executors, which was considerably less.

The action was tried at Orangeville on the 24th of October, 1899, before FERGUSON, J., who held that the plaintiff was entitled only to the interest, but his judgment was reversed on this point by the Divisional Court, who ordered the defendant Lipsett to pay the costs of the motion, not interfering with the disposition made of the costs of the action.

The appeal was argued before BURTON, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 29th of May, 1900.

A. A. *Hughson*, for the appellant. Upon the proper construction of the will, the plaintiff is entitled to receive only the interest of the fund, the *corpus* of which is specifically bequeathed to, and must be kept intact for, the appellant and those whom he represents. See *Baker v. Baker* (1858), 6 H.L.C. 616; *Foster v. Smith* (1845), 1 Ph. 629; *Michell v. Wilton* (1875), L.R. 20 Eq. 269; *Salvin v. Weston* (1866), 35 L.J. Ch. 552; *Jones v. Jones* (1879), 27 Gr. 317; *Almon v. Lewin* (1881), 5 S.C.R. at p. 534; *Wright v. Callender* (1852), 2 D. M. & G. 652; *May v. Bennett* (1826), 1 Russ. 370; *Koch v. Heisey* (1894), 26 O.R. 87. The appellant should not have been ordered to pay costs.

Argument.

*J. N. Fish*, for the respondent. The language of the will is very plain and must be given effect to. Evidently the testator intends his widow to have an annuity of \$200 a year and not interest of an uncertain amount. He directs the first payment to be made at a date when the estate would not be wound up and when no interest would be earned, and this, as pointed out in *Carmichael v. Gee* (1880), 5 App. Cas. 588, which governs this case, is sufficient to dispose of the contrary contention. The appellant having chosen to contest the plaintiff's claim, and not having been content to submit in his representative capacity to the order of the Court, was properly visited with the costs.

*Hughson*, in reply.

June 29th, 1900. MACLENNAN, J.A. :—

It will assist in determining the question in this appeal to observe that, besides the legacy of \$200 a year to the plaintiff, the testator gives several specific legacies, and also several pecuniary legacies, and a devise of land, all of which are given and intended to be received by the respective legatees, and devisee, quite as absolutely as the legacy to the plaintiff, and not in any way out of a residue or subject to that of the plaintiff. These are the choice of beds, and articles pertaining thereto, and the watch and chain which are given to the plaintiff, the \$100 given to his sister Mary Cooney, \$100 to Mrs. Mary Etterd, \$100 to the Methodist Church, the provisions for a monument over the graves of his parents, \$150; and also his real estate in the Township of Amaranth to be equally divided between his nephews John Cooney and Edward B. Cooney, and his books and clothing. The land is devised specifically, the chattels are given specifically, and if there is a deficiency of other assets for the payment of the plaintiff's annuity and the other pecuniary legacies, they must abate ratably.

Judgment.MACLENNAN,  
J.A.

No question of abatement arises, however, for it was agreed by counsel at the trial that the executors have in their hands the sum of \$1,950, which is all the estate to be dealt with in the action, a part thereof being advanced by the executors in lieu of all claims to lands.

The money in hand is not sufficient to pay the plaintiff's annuity without resorting to the capital, and the question is whether the plaintiff is entitled to do that, to the disappointment of the testator's brothers, Robert and George Lipsett, and their families, between whom the *said principal* was to be equally divided at the plaintiff's death.

The testator evidently thought his estate was, or might be, more than sufficient to pay not only the annuity to the plaintiff but the other legacies, for he adds at the end: "Balance of my estate in cash, mortgages, notes, and bank account to be equally divided between my brothers Robert and George Lipsett as soon as possible after my decease."

Now, while the testator has said with reference to the legacy to his wife that the executors are to take as much of his estate and moneys to be put to interest as will make two hundred dollars of interest per year for her, he has also in effect said that they are to take as much of it as will satisfy the other gifts and the devise of land which he has made, some of them being specific and others general, and none of them residuary relatively to that of the plaintiff, the only residuary legatees being his brothers, to whom also the principal of the fund intended to produce the legacy to his wife is given at her death. I therefore think that the direction to take and put to interest a sufficient part of his estate for his wife's legacy does not help the conclusion that he intended his wife to be the mere tenant for life of the fund so to be taken and put to interest, or that it diminishes the force of the clear and distinct words: "Said amount of two hundred dollars to be paid to my beloved wife each and every year of her life, said two hundred dollars to be paid by

my executors to my beloved wife on the first day of January next after my decease, and every subsequent payment to be paid on the first day of January in each and every year thereafter." I think these are the controlling words of the will. The testator does not use the word "*annuity*," but an annuity is nothing more than an annual sum, and he has used the strongest possible language to indicate that she is to have an annual payment of \$200 every year of her life to be paid on a fixed day. No doubt some of the reasons for a different conclusion which existed in *Baker v. Baker* (1858), 6 H.L.C. 616, may be found here, but so also are some of those relied on in *May v. Bennett* (1826), 1 Russ. 370; *Wright v. Callender* (1852), 2 D. M. & G. 652, and *Carmichael v. Gee* (1880), 5 App. Cas. 588. But while this will is different from those which were in question in all those cases, I think it is most like the last three than the first.

I am therefore of opinion that the judgment is right, and that the appeal should be dismissed.

With regard to the disposition of the costs of the trial, and of the motion to the Divisional Court, I think there is no ground on which we ought to interfere.

Moss, J.A. :—

I have, though not without some hesitation, reached the conclusion that the judgment appealed from should be affirmed.

The authorities have rendered it not altogether easy to draw the line between a gift of an annuity and a gift of the income of a sum of money to be invested.

But, upon the whole, I think the controlling intention of the testator was to secure to his wife the receipt of \$200 a year under any circumstances. His anxiety that she should receive \$200 a year is manifested by the repetition of those words, first in the direction that that amount is to be paid to his wife each and every year of her life, and

Judgment.

MACLENNAN,  
J.A.



Judgment.  
MOSS, J.A.

secondly in the declaration that it is to be paid to her on the first day of January next after his decease, and every subsequent payment to be paid on the first day of January in each and every year thereafter. These payments are to be made without regard to whether the circumstances enable the executors to have so much in hand in the shape of interest derived from investments at the appointed dates. It can hardly be assumed that, as was suggested in argument, the testator had in his mind the feasibility of the executors so investing as to secure the interest in advance.

I think this case falls within the category of gifts of an annuity, and that the directions about putting to interest are not sufficient to cut down the bequest to a gift of the interest merely.

The appellant asked that we should modify the order of the Divisional Court regarding the payment of the costs of the motion, but having regard to the nature and extent of the fund, we do not feel justified in burdening it with further costs.

The appeal should be dismissed with costs.

BURTON, C.J.O., OSLER, and LISTER, J.J.A., concurred.

*Appeal dismissed.*

R. S. C.

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## CULBERTSON V. McCULLOUGH.

*Estate—Estate Tail—Bar of Entail—Mortgage—Will—Construction.*

By a will made in 1847 a testator, who died in 1854, devised to his son a piece of land, describing it, and proceeded: "All which shall be and is hereby entailed on my said son and his heirs for ever." In 1859 and again in 1860 the son granted the land in question in fee by way of mortgage, each mortgage being duly registered within less than six months of its execution and each containing the usual proviso that it should be void on payment at a named date. No discharge of either mortgage or reconveyance of the mortgaged land had been registered, and there was no evidence whether either mortgage had in fact been paid:—

*Held, per* MACLENNAN, and LISTER, JJ.A., that under this will the son took an estate tail;

But *held, also, per Curiam*, that even if the son did take an estate tail that estate had been barred and converted into an estate in fee simple in his own favour as well as in that of the mortgagee by the execution and registration of the mortgages.

*Lawlor v. Lawlor* (1882), 10 S.C.R. 194, applied, and *Plomley v. Felton* (1888), 14 App. Cas. 61, distinguished.

Judgment of FERGUSON, J., affirmed.

APPEAL by the plaintiffs from the judgment of FERGUSON, J. Statement.

The plaintiffs were the grandchildren of one John Culbertson, and claimed that, as tenants in tail under his will, they were entitled to certain land of which the defendant was in possession. The will was made on the 19th of January, 1847, and by it the testator gave to his son Archibald, father of the plaintiffs, one hundred acres of land, describing it, "all which shall be and is hereby entailed on my said son Archibald and his heirs forever." The testator died on the 18th of April, 1854. The son Archibald went into possession of the land devised to him, and on the 22nd of October, 1859, mortgaged it in fee to one John Stevenson to secure the repayment of \$1000, and the mortgage contained a proviso that it should be void on payment of that sum. This mortgage was registered (by memorial) on the 9th of November, 1859. On the 6th of November, 1860, Culbertson made a second mortgage in fee to Stevenson to secure \$231, with a similar proviso, and this mortgage was registered (by

Statement. memorial) on the 12th of November, 1860. No re-assignment or discharge of either mortgage was registered or produced, and it was not proved that either mortgage had been paid. There were some other dealings with the land which it is not necessary to set out, and the defendant ultimately purchased the portion in question. Archibald Culbertson died in 1892, and he had not been in possession of the land in question for very many years before his death.

The action was tried at Belleville on the 20th of November, 1899, before FERGUSON, J., who, on the 25th of November, 1899, gave the following judgment :—

FERGUSON, J. :—

The plaintiffs' rights depend wholly upon a tenancy in tail having been created by the provisions of the clause in the will of John Culbertson. I am of the opinion that the clause does not contain words sufficient to create such a tenancy (a tenancy in tail). The words relied on were, of course, the words of the last sentence in the clause. These words, as they appear to me, are not only ambiguous but repugnant and contradictory when examined with the view of ascertaining whether or not they create an estate tail. Counsel for the plaintiffs had found no authority throwing light on the subject in the plaintiffs' favour, and I have not found any. Again, it is to be remarked that by the earlier part of the clause an estate in fee is given to Archibald, which, in my view, could not be cut down to an estate tail by the subsequent ambiguous words—words which, as I think, are repugnant to one another.

Again, even if it were assumed that an estate tail was created by the clause under consideration, then, as it appears to me, such an estate tail was barred by the execution and registration of the mortgage made by Archibald on the 22nd of October, 1859, and registered on the 9th of the following month of November. This

was, as appears, the first conveyance of the land made by Archibald, and I think that if this were an estate tail it would have operated as, and had the effect of, a disentailing assurance.

In these circumstances I need not, as I think, further consider the ingenious arguments of counsel regarding the meaning and application or not to the case of the provisions of the 27th and 29th sections of the Real Property Limitations Act. It was conceded that if the limiting provisions of the sections did apply, the length of possession against Archibald was amply sufficient.

My conclusion is, for the reasons that I have stated, that the plaintiffs have no title to the lands, and that the action should be dismissed with costs.

The appeal was argued before OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 5th and 6th of June, 1900.

*E. Guss Porter*, for the appellants. Reading the clause as a whole, the intention of the testator to give an estate tail is clear; to hold that an estate in fee simple is given is to reject part of the clause, and there is no reason for doing this violence to the language used: *Smith v. Osborne* (1857), 6 H.L.C. at p. 399; *Ashbridge v. Ashbridge* (1892), 22 O.R. 146; *Evans v. King* (1893), 23 O.R. at p. 407; *Jordan v. Adams* (1861), 9 C.B.N.S. 483; *Dumble v. Johnson* (1866), 17 C.P. 9; *Jenkins v. Hughes* (1860), 8 H.L.C. 571; *Biddulph v. Lees* (1858), E. B. & E. 289; *Doe d. Jearrad v. Bannister* (1840), 7 M. & W. 292. The estate tail has not been barred. The mortgages do not have the effect contended for. There has been no re-conveyance or discharge, and *Lawlor v. Lawlor* (1882), 10 S.C.R. 194, does not apply. It may be that the mortgagee would take in fee for the purposes of the mortgage, but as soon as his claim was paid, and the presumption in the present case is that it has been paid, his rights came to an end, and the mortgagor's estate was just in the same condition as if the mortgages had never

Judgment.

FERGUSON, J.



Argument.

been made. [The learned counsel then dealt with the defence under the Statute of Limitations].

*Aylesworth, Q.C.*, and *W. B. Northrup*, for the respondent. There is an absolute gift in fee, and the subsequent words do not cut this down. There is merely a general statement of a wish to keep the property in the family. But even if there was an estate tail, it was put an end to by the mortgages. They operated not only for the benefit of the mortgagee but for the benefit of the mortgagor, and as soon as they were executed and registered the estate tail was barred. The exception in the statute as to mortgages applies only to mortgages expressed to be mortgages of a limited interest; given a duly registered mortgage in fee, such as there is here, and the absolute bar arises. In any event the Statute of Limitations applies.

*Porter*, in reply.

June 29th, 1900. OSLER, J.A. :—

I am of opinion that the appeal must be dismissed, but I do not think it necessary to determine the question whether, under the peculiar language of the will of the plaintiffs' grandfather, their father took an estate tail. If he did not, the foundation of the plaintiffs' case fails. If he did, the effect of the mortgages in fee made by him to Stevenson in 1859 and 1860 without any contract or stipulation for a resettlement in tail on the discharge of the mortgages, was to bar the entail and convert it into an estate in fee simple in his own favour as well as in that of the mortgagee. This appears to be the clear result of the case of *Lawlor v. Lawlor* (1882), 10 S.C.R. 194, and the subsequent case in the Privy Council upon an Act similar to our own: *Plomley v. Felton* (1888), 14 App. Cas. 61.

Other questions were argued as to the effect of the Statute of Limitations, etc., which the decision of this point renders of no importance.

MACLENNAN, J.A. :—

Judgment.

MACLENNAN,  
J.A.

Upon the first ground on which my learned brother decided the case I am unable, with great respect, to agree with him.

The devise is: "I give to my son Archibald one hundred acres of land (describing it), all which shall be and is hereby entailed on my said son Archibald and his heirs for ever."

My learned brother thought the words relating to the entail ambiguous and repugnant to each other and to the introductory words of gift. They are no more repugnant to the words of gift, in my opinion, than if the expression had been, "to be held by him as tenant in tail," in which case no one could doubt that the estate would be an estate tail. Nor am I able to think that the words are repugnant to each other. The meaning of the words is as simple and clear as anything can be. The estate is to be entailed upon Archibald and his heirs, meaning, of course, only such heirs as could in law be the objects of an estate tail—that is to say, heirs of the body. I think the case cannot be distinguished from the innumerable cases in which effect has been given to language in wills manifesting the intention of the testator that the estate which the devisee is to take in the land is a fee tail.

But for the mortgages which were made by Archibald, the actual tenant in tail, I think the plaintiffs would have been entitled to recover.

The defendant claims under two deeds, the one of lot 11 made to the School Board on the 11th of May, 1860, registered more than six months afterward; the other of lot 12 to one Leamington on the 6th of July, 1860, also registered more than six months afterward, both made by Archibald for valuable consideration in fee simple, and followed by possession by the grantees, and those claiming under them, including the defendant, until the present time. Archibald died on the 15th of May, 1892, within ten years

Judgment.  
MACLENNAN,  
J.A.

next before the bringing of the present action. In *Cannon v. Rimington* (1852), 12 C.B. 1, it was decided by the Court of Common Pleas, and affirmed unanimously in the Exchequer Chamber by a bench of eight judges, that such a case was within the 3rd section of 3 & 4 Wm. IV., ch. 27, now R.S.O. ch. 133, sec. 5 (11), and not within section 21 of the Imperial Act, now R.S.O. ch. 133, sec. 27, and that the heir in tail would have a new right of entry at the death of the actual tenant in tail, who had parted with his estate for life by a deed which had not the effect of barring his issue. It was also held that section 27 is inapplicable to such a case, but applicable only to a case in which the actual tenant in tail has been dispossessed and time has been running or has run against him at his death and not against his vendee, by an unenrolled or unregistered deed. It is also clear that sections 28 and 29 are inapplicable. See also Brown on Limitation, p. 460; Darby & Bosanquet on Limitations, p. 329; Sugden's Property Statutes, 2nd ed., pp. 23, 34, 35, 84, 85, 86; Sugden on Vendors, 14th ed., pp. 483-4; *Taylor v. Horde* (1756), 2 Sm. L.C., 10th ed., pp. 656-662.

It remains to consider the effect of the mortgages made by Archibald Culbertson to John Stevenson, of which there were two, both in the usual form in fee simple; the first on the 22nd of October, 1859, registered on the 9th of November, 1859, to secure \$1000, payable in two years; and the other on the 6th of November, 1860, registered on the 12th of November, 1860, to secure \$231, payable in one year. In both cases the proviso is that the mortgage is to be void on payment on the named day. No evidence has been given to shew what became of these mortgages, or whether they were ever paid or discharged, but it is admitted that the purchasers from the mortgagor have never been disturbed in their possession.

The judgment is that the plaintiffs' claim was barred by the mortgages, and I think the decision right.

In *Lawlor v. Lawlor* (1881), 6 A.R. 312, it was held in this Court that the registration of a statutory discharge of a mortgage in fee by a tenant in tail revested an estate tail, and not an estate in fee simple in the mortgagor. That judgment proceeded on the language of the statute, which declares the legal effect of such a discharge when registered. The judgment was reversed by the Supreme Court (1882), 10 S.C.R. 194. Although the judgments proceeded very much upon a construction of the language of the statutory certificate of discharge, I think it is impossible to read them without seeing that, in the opinion of the learned Judges, the mere execution of a mortgage in fee by a tenant in tail, followed by registration within six months, bars the entail for all purposes by force of the 9th section of the Act [R.S.O. (1877), ch. 100]. The section is as follows: "If a tenant in tail of lands makes a disposition of the same, under this Act, by way of mortgage, . . . then such disposition shall, to the extent of the estate thereby created, be an absolute bar *in equity, as well as at law*, to all persons as against whom such disposition is by this Act authorised to be made, notwithstanding any intention to the contrary expressed or implied in the deed by which the disposition is effected." Now, the Act authorises the disposition to be made against the issue and all persons entitled in remainder, as expressed by section 31, and the bar is absolute in equity as well as at law. Therefore, the moment the disposition is made, although by way of mortgage only, the issue and the remaindermen have no longer any right left either legal or equitable in the land; all such rights have been barred, and the only persons who have any right either legal or equitable are the mortgagor and the mortgagee. The mortgagee has the legal estate, an estate in fee simple, and the mortgagor has the equity of redemption. Of course I am speaking of the case of a mortgage in fee. If this be the effect of the Act, then by the mere execution and registration of the first mortgage to Stevenson, the estate of the mortgagor became for all purposes an estate in fee

Judgment.

MACLENNAN,  
J.A.



Judgment.

MACLENNAN,  
J.A.

simple, subject to the mortgage, and the rights of his issue were absolutely barred. This construction of the first clause of section 9 is, I think, made free from all doubt by the final clause, which is by way of exception, when the disposition is only an estate *pur autre vie*, etc., in any of which cases the disposition is *in equity* to be a bar only so far as may be necessary to give full effect to the mortgage, etc. In the one case the bar is to be absolute, and not merely for the purpose of giving effect to the mortgage; in the other the estate remains an estate tail, as before, except so far as the rights of the mortgagee are concerned.

The case of *Plomley v. Felton* (1888), 14 App. Cas. 61, must however be considered. In that case a father, who was tenant for life, had mortgaged his life estate, and desiring a further advance, induced his eldest daughter, who had just become of age, to join him in a mortgage for that purpose. This daughter was one of seven children who were tenants in common in tail, with cross remainders in tail of the same lands, of which the father was tenant for life. By the mortgage the daughter conveyed her estate to the mortgagee in fee, whereby the entail was barred by the effect of an Act of New South Wales, which I think may be taken to have been like the Imperial Act and our own statute. The deed contained recitals that the daughter and her husband had been induced to bar the entail and to join in the deed in order to better the security for the loan to her father; and went on to declare that if the money should be paid, then "the said mortgagee will, at the request and costs of the mortgagors, reconvey the said hereditaments unto the said mortgagors respectively, or as they shall respectively appoint, according to their original respective estates and interest therein." The Judicial Committee held that, according to the true construction of the proviso, the parties were entitled to a reconveyance of the estate as originally held by them, and not as altered for the purposes of the mortgage. Their Lordships proceeded altogether upon the express stipulation in the deed,

and at p. 65, Lord Macnaghten, in delivering judgment, stated the question to be: "Is the deed to be regarded as a mere mortgage, a mere charge; or is it a mortgage, and a new settlement, or new disposition combined?" And the effect of the judgment is, that it was not a mere mortgage, but that it provided for a resettlement of the land, on redemption, upon the original limitations. It is evident that if the provision for a new settlement had not been found in the deed, it must have been held that the entail had been effectually barred.

I am, therefore, of opinion that the right of the present appellants was barred by the mortgages in fee made by their father, Archibald Culbertson, to John Stevenson, the same having been registered within six months, as required by the Act: C.S.U.C. ch. 83.

The appeal should therefore be dismissed.

Moss, J.A. :—

I agree in the result; though, if the case turned upon the question of whether or not an estate tail was created by the will, I would probably desire to further consider that point.

In the bewildering multitude of cases bearing on a question of this kind, the only safe guide that one can discover is to ascertain, if possible, by the language of the will, read in the light of the surrounding circumstances, the intention of the testator, and it is by no means clear to my mind that the use of the word "entailed," in the connection in which it is so used, indicates any intention to create the estate known as an estate tail. I think it is used in such connection with the other language as to lead to the conclusion that the mere effect of the word there is to shew an anxiety on the testator's part to see that all the property, which he describes with some minuteness in that clause of the will, shall go to that particular son and his heirs. The cases are, as I have said, very many; the

Judgment.

MACLENNAN,  
J.A.

Judgment.

MOSS, J.A.

line between them is very narrow, and the learned trial Judge was of the view that no estate tail was created. I do not feel prepared to say at present that he was wrong in his view. But upon the other branch of the case, with regard to the disentailing effect of the mortgages, I am quite clear that they have the effect attributed to them by my brother MACLENNAN. The result is that the estate tail, if there ever was one, was effectually barred, and the plaintiffs have no estate in the land.

LISTER, J.A. :—

I agree with my brother MACLENNAN:

*Appeal dismissed.*

R. S. C.

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## FILE V. UNGER.

### *Master and Servant—Parent and Child—Negligence.*

The doctrine of the liability of a master for his servant's negligence applies in the case of the implied relationship of master and servant sometimes existing between parent and child, but as in the case of master and servant so in that of parent and child there is no liability if at the time the negligent act is committed the child is engaged in his own affairs and not on the parent's behalf.

The father of a lad of twenty, living at home, was held not liable therefore for an accident caused by the lad's negligence while driving, with the father's implied permission, the father's horse and carriage home from a shop to which the lad had gone to purchase, with money earned by himself, articles of clothing for himself.

Judgment of ARMOUR, C.J., reversed.

Statement.

APPEAL by the defendant from the judgment at the trial.

The following statement of the facts is taken from the judgment of LISTER, J.A. :—

The action was brought to recover damages for personal injuries received by the plaintiff Armenella File

and for injuries done to the horses and waggon of the plaintiff Charles E. File, occasioned, as it was alleged, by the negligence of the defendant's son and servant.

Statement.

The plaintiffs, by their statement of claim, allege that "on the 25th day of February, 1899, while the plaintiffs were lawfully driving along the public travelled road in the Township of North Fredericksburgh with a team of horses and a waggon, the defendant's horse and buggy, under the charge and control of his servants and agents, negligently, suddenly, and without warning, drove into the waggon of the plaintiff Charles E. File, thereby causing the plaintiff Armenella File to be thrown out of the waggon, and the said Armenella File was bruised and injured, and in consequence thereof has been ever since ill and suffering and unable to attend to her business, and the plaintiffs have in consequence incurred heavy medical and other expenses and sustained great loss. The plaintiff Charles E. File's horses and waggon were also in consequence of the negligent driving of the defendant as aforesaid on the public highway on the said 25th day of February, 1899, injured, and the said plaintiff sustained damages thereby."

The evidence was that on the morning of the day in question the defendant's minor son, Hedley, without the knowledge of his father, took his father's horse and buggy for the purpose of going to Napanee to get trimmings for a suit of clothes, the material for which he had, before then, bought with his own money, and which his mother was then making up for him, and also for the purpose of buying some articles of wearing apparel which he required preparatory to going to Manitoba on his own account. His mother, at his request, accompanied him for the sole purpose of selecting the trimmings, but while in town bought a trifling article for herself. In driving home, when passing the plaintiff's waggon, which was standing on the side of the travelled way, with the plaintiff's horses harnessed thereto, the hub of the buggy wheel



## Statement.

caught the wheel of the plaintiff's waggon and the plaintiff's horses ran away, resulting in the injuries complained of. The son, at the time of the accident, was within a month or two of being twenty years of age. He was then living at home assisting in the work of the farm, as farmers' sons usually do when at home. He had for some four or five years been in the habit of working now and then for others for wages, which his father allowed him to keep, and with which he bought his own clothes, etc. He received nothing from his father during that time except his board and lodging while at home. There was evidence that the horse which he was then driving had, on several occasions before the day of the accident, run away, but it was not contended that it was not under control at the time of the accident. There is no doubt that, if the defendant had known that his son intended taking the horse and buggy, he would have offered no objection, though his permission was not asked.

The action was tried by ARMOUR, C.J., who found (1) that the injury was occasioned by the negligent driving of the defendant's horse and buggy by his son Hedley; (2) that Hedley was at the time the servant of the defendant; (3) that he had the implied authority of the defendant to take his horse and buggy as and for the purpose he took it; and (4) that the son was acting in the course of his employment as his father's servant, and he gave judgment in favour of the plaintiff Armenella File for \$200 and in favour of the plaintiff Charles E. File for \$60.

The appeal was argued before OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 6th and 7th of June, 1900.

*Thomson*, Q.C., for the appellant. There is nothing in the evidence to justify the finding that the defendant's son was at the time of the occurrence in question acting in the course of his employment as the defendant's servant, and unless he was so acting there is no liability. The relationship of parent and child is not in itself enough, for the responsibility of the father for the son's

act is no greater than the responsibility of the master for the servant's act; in either case the act complained of must be done in the course of the employment. The general rules are laid down in *Patten v. Rea* (1857), 2 C.B.N.S. 606. An unreported decision of *McLaughlin v. Schmidt* has been relied on. It is certainly very like the present case, and the Court came to the conclusion of fact that the act was done during the course of the employment. But a finding on the evidence in that case does not carry us any further in this case, and moreover, this Court is not bound by the decision. See *Shearman and Redfield on Negligence*, 5th ed., sec. 144; *Way v. Powers* (1884), 57 Vt. 135; *Maddox v. Brown* (1880), 71 Me. 432; *Bard v. Yohn* (1856), 26 Pa. St. 482; *Smith v. Davenport* (1891), 25 Pac. Rep. 851.

*Aylesworth*, Q.C., for the respondents. With the general principle of law appealed to we do not quarrel, and we contend that we bring ourselves within it. The trip in question was really undertaken for the general benefit of the household and with the father's implied permission. The general relationship of master and servant existed, and the facts justify the conclusion that on this occasion there was nothing to make any break in that relationship: *Gerhardt v. Swaty* (1883), 57 Wisc. 24; *Schaefer v. Osterbrink* (1886), 67 Wisc. 695.

*Thomson*, in reply.

June 29th, 1900. OSLER, J.A. :—

In order to recover in a case like the present, the plaintiffs must prove not only that the son was the servant of his father, but also that the negligent act or omission complained of occurred in the course of his employment as such.

It may be that in the case of a minor child living at the father's house and performing work about the house or on the farm, the relationship of master and servant is

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OSLER, J.A.

presumed to exist; and we may, for the purpose of the present case, presume it here, although in the circumstances I think it admits of considerable doubt: Eversley on Domestic Relations, 2nd ed., pp. 552, 553.

But how can it possibly be said that the act complained of in the case at bar was committed while in the course of the father's employment? The son was not engaged in doing anything for the father or on a journey on the ordinary business or pleasure of the family, or about to do anything for which the father, as head of the family, was to become responsible. In the strictest sense of the word he was going about his own business just as an ordinary hired servant would have been doing had he, with the permission of his master, taken the horse on a similar errand. In *Moon v. Towers* (1860), 8 C.B.N.S. 611, where a minor son of the defendant, and treasurer of a theatre of which his father was lessee, caused another servant to be arrested for fraud, it was held that the father was not liable though he refused to prohibit the son from proceeding with the matter. Willes, J., said: "The tendency of juries, where persons under age have incurred debts or committed wrongs, to make their relatives pay, should, in my opinion, be checked by the Courts. No man ought, as a general rule, to be responsible for acts not his own." And in Schouler on Domestic Relations, 4th ed., sec. 263, and Eversley on Domestic Relations, 2nd ed., p. 564, it is stated as a rule that a father is not responsible in damages for the torts of his child committed without his knowledge, consent, participation, or sanction, and *not in the course of his employment of the child*.

The rule, in short, to be applied is that which obtains in the ordinary case of master and servant, and on the evidence it excludes the liability of the father in the present case.

I may refer to *Patten v. Rea* (1857), 2 C.B.N.S. 606; *Way v. Powers*, (1884), 57 Vt. 135; *Schaefer v. Osterbrink*

(1886), 67 Wisc. 495; *Maddox v. Brown* (1880), 71 Me. 432.

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Of the unreported case of *McLaughlin v. Schmidt*, decided by a Divisional Court in 1897, and referred to in the judgment below, it is enough to say that, having read a copy of the evidence, the facts appear to be different, and the Court thought there was some evidence for the jury. For myself I could only say of it that it would seem to have been a case to which the observation of Willes, J., above quoted, might well have been applied.

I think, with all respect, that the judgment should be reversed and the action dismissed.

LISTER, J.A.:—

From the evidence I think it is very plain that this appeal ought to be allowed.

In order to entitle a person to maintain an action against another for an injury resulting from the negligence of a third person, it is essential not only that the relation of master and servant should exist between the person sought to be charged and the person whose negligence occasioned the injury, but that the servant guilty of the negligence should, at the time the negligent act was done, be acting in the employment of or on the business of the master.

In *Storey v. Ashton* (1869), L.R. 4 Q.B. at p. 479, the rule applicable to cases such as this is laid down by Cockburn, C.J., in these words: "I think the judgments of Maule, and Creswell, JJ., in *Mitchell v. Crassweller* (1853), 13 C.B. 237, express the true view of the law, and the view which we ought to abide by, and that we cannot adopt the view of Erskine, J., in *Sleath v. Wilson* (1839), 9 C. & P. 607, that it is because the master has entrusted the servant with the control of the horse and cart that the master is responsible. The true rule is that the master is responsible only so long as the servant can be said to



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be doing the act, in the doing of which he is guilty of negligence, in the course of his employment as servant." See also *Patten v. Rea* (1857), 2 C.B.N.S. 606; *Burns v. Poulson* (1873), L.R. 8 C.P. 563; *Venables v. Smith* (1877), 2 Q.B.D. 279; *Stephens v. Chaussé* (1888), 15 S.C.R. 379; *Stretton v. Toronto* (1887), 13 O.R. 139; and *Coll v. Toronto Railway Co.* (1898), 25 A.R. 55.

While I think that the learned Chief Justice rightly found that the injuries complained of were due to the negligence of the defendant's son, I am not, upon the facts as proved, satisfied that at the time of the accident the relation of master and servant existed between the defendant and his son: see *Eversley on Domestic Relations*, 2nd ed., p. 564, and *Moon v. Towers* (1860), 8 C. B.N.S. 611, at p. 616, there cited.

But, assuming that such relation did exist, the question arises whether the evidence justifies the finding of the learned Chief Justice that he was at that time acting in the employment of the defendant as his servant. With much respect, I do not think it does. The only evidence given on the part of the plaintiffs to show that the son was at the time of the accident acting in the employment of the defendant as his servant was the possession by the son of his father's horse and buggy, and that his mother was driving with him. It was contended that these facts bring the present case within the unreported case of *McLaughlin v. Schmidt*, decided by the Chancery Divisional Court on the 7th of October, 1897, and referred to in the judgment of the learned Chief Justice as supporting this view, and which he considered himself bound to follow.

As regards that case, I think it only necessary to say that it was tried by a jury and was determined upon its own facts, which in some respects were different from the facts here. There was some evidence there (very slight) from which the jury might, as they did, conclude that the son in driving other members of the family was acting as his father's servant or agent at the time of the accident.

No presumption arises that the son—a minor—was, at the time of the accident, acting in the employment of his father as his servant, merely because he was in possession of and driving his father's horse and buggy, even with his father's consent, and accompanied by his mother. If such a presumption could, upon the facts here, arise, it has been fully rebutted by the evidence on the part of the defendant, which, in my opinion, clearly establishes that the son at the time of the accident was engaged solely upon his own business and not in any sense upon his master's business. I think there is no evidence to sustain the finding, and therefore, in my opinion, the appeal ought to be allowed and the action dismissed with costs here and below.

Judgment.  
LISTER, J.A.

MACLENNAN, and MOSS, JJ.A., concurred.

*Appeal allowed.*

R. S. C.

### HORSMAN V. CITY OF TORONTO.

*Assessment and Taxes—Distress—Change of Ownership—Chattel Mortgage—Purchase from Mortgagee—R.S.O. ch. 224, sec. 135, sub-sec. 4 (b).*

Goods purchased from the chattel mortgagee thereof are not "claimed . . . by purchase, gift, transfer, or assignment" from the mortgagor within the meaning of R.S.O. ch. 224, sec. 135, sub-sec. 4 (b), so as to make them liable in the purchaser's hands to distress for taxes due by the mortgagor.

Judgment of MEREDITH, C. J., 31 O.R. 301, affirmed.

APPEAL by the defendants from the judgment of MEREDITH, C.J., reported 31 O.R. 301.

Statement.

The action was brought to recover damages for an illegal distress, made in January, 1899, for taxes due in the year 1897. The premises in respect of which these taxes

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were payable, and upon which the goods in question were at the time of the seizure, were occupied in 1897, and up to the 25th of August, 1898, by John C. Palmer, who carried on business there as hotelkeeper. In July, 1896, Palmer gave to the Royal Loan and Savings Company, who were his landlords and head lessees of the building, a chattel mortgage upon the goods in question, with power of sale upon default in payment, and in August, 1898, default having occurred, the mortgagees leased the building to the plaintiff, and sold the goods in question to her, and she went into possession of the building and the goods and carried on business as hotelkeeper thereafter up to the time of the seizure. The sale of the goods was evidenced by a bill of sale, bearing date the 25th of August, 1898, and by it the Royal Loan and Savings Company and one William Adams, who also held a chattel mortgage from Palmer upon some of the goods in question, purported to sell and assign the goods in question to the plaintiff, with absolute covenants and a recital of ownership. There was no reference in the bill of sale to the chattel mortgages and no statement that a power of sale was being exercised. Palmer was, however, made a party to the bill of sale, and thereby "consented to the transfer of the said goods and chattels by the parties of the first part (Royal Loan and Savings Company and Adams) to the party of the second part (plaintiff)." The purchase money was \$9000, and the plaintiff paid \$3000 and gave a chattel mortgage to the Royal Loan and Savings Company for \$6000. No part of the \$3000 was received by Palmer; out of that sum the Adams claim was satisfied and the balance was applied in reduction of the claim of the Royal Loan and Savings Company.

The appeal was argued before OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 7th of June, 1900.

*Fullerton*, Q.C., for the appellants. There was not, as found by the learned Chief Justice in the Court below, a sale by the mortgagees to the plaintiff, but merely a re-

adjustment of tenancies and liabilities, and any title which the plaintiff has she acquired from Palmer, with the assent of the mortgagees. At the most there was a sale by the mortgagees *quod* mortgagees with the mortgagor's consent and even in that way of looking at it the title would come through Palmer, the mortgagor, so that in either view the case falls within the Act. See *Smith v. Smith* (1852), 3 Gr. 451; Am. and Eng. Encyc. of Law, vol. 18, p. 925; vol. 3, pp. 189, 205, 207; *Sheppard v. Earles* (1878), 13 Hun 651.

*Brewster*, Q.C., and *Heyd*, Q.C., for the respondent. The goods in question were sold by the mortgagees after default and after seizure, and there was in no sense a sale by the mortgagor. His only right was to call upon the mortgagees for an account, and the purchaser does not claim through him. [The learned Counsel also contended that the seizure was invalid because of defects under the Assessment Act, but the objections are not dealt with in the judgments and it is not necessary to state them.]

*Fullerton*, in reply.

June 29th, 1900. OSLER, J.A.:—

I am of opinion that the judgment should be affirmed. The defendants' single point was that the sale to the plaintiff was really a sale by the mortgagor Palmer, the person assessed, because it was a sale by his mortgagees, and, as it was contended, under and in pursuance of a power of sale in the chattel mortgage, and several authorities were cited and relied on for the proposition that in such a case the conveyance is really by the mortgagor and not by the mortgagees who are only exercising the power given to them to convey the mortgagor's interest. If the case ought to be looked at in that way, it may be that if there were no other defect in the defendants' proceedings the property then acquired by the plaintiff would have been liable to seizure for the taxes



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OSLER, J.A.

assessed against Palmer during his occupancy of the premises, because it would fall within the exception contained in R.S.O. ch. 224, sec. 135, 4 (b), as being claimed by "purchase, gift, transfer, or assignment from the owner or person assessed." In my opinion, however, it is not necessary to consider how far the proposition referred to would apply for the purpose of the exception mentioned in the clause referred to, because the bill of sale by the mortgagees to the plaintiff does not purport to be made in pursuance of the power, and it is not necessary to invoke the power in order to support it. The mortgage was in default and the mortgagees, as they had the right to do, sold as owners, and it is their title and not the title of the person assessed which the plaintiff relies upon. The section points to a conveyance directly *from* that person as that which does not avail to exempt the property from seizure for the taxes. A title under a conveyance from a third person, not by the person assessed, is paramount to the right of the municipality. It is right that it should be so, and the sooner municipalities understand it the better for themselves and every one else. The plain intention of recent legislation is to discourage the practice of allowing taxes to remain uncollected for years, though the person assessed may have had ample property on the premises, and then falling upon some subsequent lessee or owner who may have no recourse against the real tax debtor.

The appeal must be dismissed with costs.

Moss, J.A.:—

In this case the distress complained of was made in January, 1899, for the taxes for the year 1897. Palmer, the person assessed, had gone out of possession before the 16th of August, 1898, and the plaintiff shortly after that date entered as lessee of the premises from the Royal Loan and Savings Company. She had previously purchased the goods which the defendants afterwards distrained upon

from the Royal Loan and Savings Company and had received a bill of sale from that company in which Palmer joined to consent to the transfer.

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MOSS, J.A.

The loan company's title was derived through a chattel mortgage from Palmer, which at the time of the bill of sale to the plaintiff was in default and the company's title had therefore become absolute. The chattel mortgage contained a power of sale but on selling to the plaintiff or in making the bill of sale to her no reference was had to the power, and it is clear the sale to the plaintiff could be legally and validly made without the aid of such a power in the chattel mortgage.

The defendants' contention is that the company's title was only that of a mortgagee and that the sale to the plaintiff was merely an exercise of the power in the chattel mortgage, and that therefore the goods come within sub-section 4 (b) of section 135, R.S.O. ch. 224, and were therefore liable to be levied upon by distress for the taxes which had accrued before the plaintiff occupied the premises.

But the goods were not acquired by purchase, transfer or assignment from the owner or person assessed within that sub-section. Before the plaintiff purchased they had ceased to be Palmer's goods and had become the absolute property of the loan company, and the plaintiff's purchase was from it and not from Palmer. These goods were therefore at the date of the distress goods and chattels on the premises not belonging to the owner or person assessed, and were exempt under the concluding clause of section 135.

The appeal fails and must be dismissed with costs.

MACLENNAN, and LISTER, JJ.A., concurred.

*Appeal dismissed.*

R. S. C.

## FERGUSON V. GALT PUBLIC SCHOOL BOARD.

*Master and Servant—Negligence—Common Employment—Workmen's Compensation for Injuries Act—Superintendence—Defect in Ways.*

The plaintiff was a labourer employed by the defendants to carry mortar to masons, also employed by them, who were building a wall on the defendants' land. The work was being done under the superintendence of a foreman, who, after the wall had been built, directed the plaintiff and one mason to do the tuck-pointing next day. In order to enable the plaintiff to take the mortar to the mason at the foot of the outer face of the wall the mason and the plaintiff made a gangway, of planks which had been used in the scaffolding, from the top of the wall to an adjacent building and thence to the ground, and while the plaintiff was walking on the gangway with a load of mortar an insecurely fastened plank gave way and he was injured :—

*Held*, that the defendants were not liable at common law, the mason and the plaintiff being fellow workmen exercising their own judgment as to the proper means of accomplishing their object, and the planks being strong and sufficient for the purpose required if properly fastened.

*Held*, also, that there was no liability under the Workmen's Compensation for Injuries Act, the mason not being a person to whose orders the plaintiff, in respect of the mode of carrying the mortar, was bound to conform, and the gangway not being a "way" within the meaning of the Act, or constructed by a person having, in regard to it, superintendence entrusted to him.

Judgment of a Divisional Court reversed.

## Statement.

APPEAL by the defendants from the judgment of a Divisional Court [MEREDITH, C.J., ROSE, and MACMAHON, JJ.] reversing the judgment at the trial of BOYD, C., dismissing the action.

The judgments in the Divisional Court, in which the facts are stated, were delivered on the 1st of March, 1900, and were as follows :—

## MEREDITH, C.J.:—

This is a motion by the plaintiff by way of appeal from the ruling of the Chancellor at the trial of the action at Guelph on the 5th of December, 1899, that the plaintiff had made out no case to go to the jury and the judgment thereupon pronounced dismissing the action with costs.

The plaintiff was a labourer in the employment of the defendants, who were erecting a stone wall on the boundary of their school premises, the other workmen engaged on

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MEREDITH, C.J.

the work being also employed by the defendants, and the action is brought to recover damages either at common law or under the Workmen's Compensation for Injuries Act, R.S.O. ch. 160, for personal injuries sustained by the plaintiff owing as he alleges to the negligence of the defendants or of some one for whose negligence they are under the provisions of the Act answerable.

The wall which was being erected was carried to a height of at least 11 or 12 feet, and would appear to have been completed with the exception of pointing it. Several stone masons and others had been employed in the work of whom a man named Sterzick was the foreman, but Sterzick and all of the other men employed, except the plaintiff and one Webster, were discharged on the Saturday previous to the Monday on which the plaintiff met with his injuries.

Webster's employment was that of stone mason, and the plaintiff was assisting him, his duty being to bring to Webster the mortar required for the work of pointing, in which Webster was engaged. There appear to have been planks and trestles on the ground, which were used to form a scaffold for the masons while the wall was being erected, and while the pointing of the upper part was being proceeded with. While the pointing of the upper part of the wall was going on, Sterzick was there and the mortar was brought by the plaintiff in a pail to the top of the wall and handed to Sterzick, but when all the masons except Webster had left, and the pointing of the lower part of the wall had to be done, it became necessary to remove the scaffold and to provide some means by which the mortar could be conveyed to Webster, who had then to do his work standing on the ground. According to the testimony of the plaintiff, the height of the wall made it impracticable to hand the pail containing the mortar from the top of the wall to Webster, and the pail could not be let down by a rope, because the wall sloped back from the ground where Webster was standing, and it, therefore,



Judgment. became necessary to construct a gangway or walk sloping  
MEREDITH, C.J. from the top of the wall to the ground, by means of which the plaintiff would be enabled to carry the mortar down. The necessity of this being done was, according to the plaintiff's testimony, on the Saturday on which Sterzick left the work, communicated to Sterzick, who said that he would speak to Webster about it. On the following Monday, after completing the pointing of the upper part of the wall, Webster set about constructing the gangway, and after it was built the plaintiff began to use it. On his second journey over it, owing to the insecure manner in which it had been fastened to the roof of a building at one extremity of it, one of the planks was loosened from its fastenings and tipped, throwing the plaintiff to the ground and causing him the injuries of which he complains in the action. According to the plaintiff's testimony the building of the gangway was the work of Webster alone, and though the plaintiff had at first doubts as to the security of the way being provided for him, these doubts were removed by Webster testing it and assuring him that it would bear twice the weight of the plaintiff.

It is at common law undoubtedly the duty of the master to provide good and sufficient apparatus for the work which his servant is employed to do, so as not to expose him unnecessarily to danger, and in my opinion there was in this case evidence to go to the jury that the apparatus supplied for the purpose of the work on which the plaintiff was employed was insufficient and defective. It would have been, I think, competent for the jury to draw the inference that the defendants knew or ought to have known that it would be necessary to supply some means by which, after the other workmen had been discharged, the plaintiff would be enabled to convey the mortar to the ground on the farther side of the wall, and if the jury had come to the conclusion that such an inference ought to be drawn, it cannot be said that there was no evidence that such means had not been supplied. I, of course,

express no opinion as to the inferences that should be drawn, and it may be that the jury might have come to the conclusion that having regard to the nature of the work and the other circumstances, the trestles and planks supplied were sufficient to have enabled the employees to construct a sufficient gangway for use by them in their work.

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MEREDITH, C.J.

On the other branch of the case there was, I think, evidence to go to the jury to support the plaintiff's case under the Act. As I have said, the plaintiff was a labourer and Webster was the mason employed. The men were not in the same grade, and there was certainly some evidence that Webster was in a superior position to the plaintiff. The evidence, in my opinion, would support a finding that Webster was a person in the service of the defendants to whose orders or directions the plaintiff was bound to conform. Sterzick, who was like Webster a mason, had been foreman, and I do not see why the inference may not be drawn that when he was discharged and Webster was the only mason left on the work it was contemplated and intended by the defendants that the plaintiff should thereafter be under the orders or directions of Webster as he had formerly been under those of Sterzick.

If that inference might be drawn, there being evidence that the plaintiff had conformed to the directions of Webster, and that his injuries resulted from his having so conformed, the case was one for the consideration of the jury, and should, in my opinion, have been submitted to them.

I am also of opinion that there was evidence to go to the jury that Webster was a person entrusted by the defendants with the duty of seeing to the condition of the ways, etc., within the meaning of sub-section 1 of section 6. The defendants sent Webster to the premises to complete the mason work, and I do not see why the inference may not be drawn that it was contemplated that he should do what was necessary to be done in the way of erecting

Judgment. scaffoldings or gangways for the purpose of the work.  
MEREDITH, C.J. According to the testimony of the plaintiff that was not a kind of work that the plaintiff understood or was intended to do, and if he was not, who but Webster could have been intended to do it?

The learned Chancellor laid much stress on the statement of the plaintiff on his examination for discovery that he and Webster were fellow-workmen. That statement was qualified by the plaintiff on his examination at the trial, and it was not, I think, for the judge but for the jury to determine how the fact was to be found, but even assuming that no qualification of the statement had been made, I am unable to see why that description is not equally applicable to him and Webster, though the latter be treated as having a position superior to that of the plaintiff.

The case of *Garland v. Toronto* (1896), 23 A.R. 238, is, I think, clearly distinguishable. There both the plaintiff and Amory, for whose negligent act the defendants were sought to be made liable, were mere labourers receiving the same wages and having a foreman over them, while in this case Webster's position was superior to that of the plaintiff, and one's common knowledge enables one to say that in all probability his wages were twice or thrice those of the plaintiff. There was no foreman in charge and there are other circumstances which may be thought to lead to the conclusion that the defendants had put Webster in a position of superintendence over the work and over the plaintiff.

As the case stands on the evidence, there is nothing to show that the defendants' workmen were trespassers in doing their work on the adjoining property. It may well be that they were doing it with the license of the owner, and it is difficult to see how it can be material, if the fact be so, that they were trespassers if that fact were not known to the plaintiff.

In my opinion, the appeal should be allowed, the judgment directed to be entered at the trial reversed, and

a new trial directed, and the costs of the appeal and of the last trial should be costs to the plaintiff in any event.

Judgment.

MEREDITH C.J.

ROSE, J.:—

I concur.

MACMAHON, J.:—

I was not present during the whole of the argument, but have carefully considered the evidence and concur in the judgment of the learned Chief Justice. I desire, however, to refer to the following authorities as to the scope and effect of the words: "To whose orders or directions the workman at the time of the injury was bound to conform and did conform" in sub-section 3 of section 3 of the Workmen's Compensation for Injuries Act. In *Dolan v. Anderson* (1885), 12 Rettie 804, Lord Craighill said: "I see in the terms of the enactment no foundation for any distinction of classes upon this subject. The question is not whether the person who gave the orders or directions occupied a high or a humble position in the works. It is simply whether, whatever was his position, he was one to whose orders or directions at the time of the accident the workman injured was bound to conform. If he was, the words of the statute are satisfied, and a limitation of their operation for the purpose of restricting the benefit the statute was intended to confer would be, not an interpretation of the words of this clause, but a capricious interference with its application."

To the like effect is *Sweeney v. McGilvray* (1886), 14 Rettie 105; *Wild v. Waygood*, [1892] 1 Q.B. 783; *Millward v. Midland R. W. Co.* (1884), 14 Q.B.D. 68, and the judgment of Lord Young in *McManus v. Hay* (1882), 9 Rettie 425.

The appeal was argued before BURTON, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 29th and 30th of May, 1900.



Judgment.

BURTON, C.J.O.

*Lount, Q.C., and W. D. Card, for the appellants.**A. Monro Grier, for the respondent.*

June 29th, 1900. BURTON, C.J.O.:—

The main facts are very fully stated by the learned Chief Justice of the Court below in his judgment, and I would simply add that the work was not of a dangerous character, the building of a retaining wall, and had been completed on the Saturday before the accident, with the exception of a little pointing at the lower part of the wall which the plaintiff and a mason of the name of Webster remained to complete.

There is no complaint that the employers had not furnished adequate and proper apparatus, materials, and resources, for doing the work, and having done this it is difficult to understand how any liability existed at common law for any negligence of the fellow workman.

It is said that as the pointing was at the lower part of the wall, which was about eleven or twelve feet high, there was some difficulty in furnishing the mortar, which was being mixed upon the ground above, some eleven feet from the level where the mason was standing, and the plaintiff complained that some means should be provided to enable him to supply it. One would have thought that a ladder or a change of venue from the upper to the lower grounds for mixing the mortar would have been a simple way out of the difficulty, but what was done was by the two men, Webster and the plaintiff conjointly, taking some of the boards which had been used in the scaffolding and making an inclined plane from the top of the wall to an adjacent building and thence to the ground.

The planks used were apparently sound and sufficient, but the first one extending from the wall to the building was insufficiently nailed to the building or shed, and when it came to be used the nails gave way and the plank turned, causing the accident.

Treating the matter still as at common law, there is nothing so far to fix the defendants with any liability, for the two parties were in one common employment exercising their own judgment as to the proper means of accomplishing their object. Even if the one had been foreman, as to which I shall have something to say when dealing with the liability under the Act, the defendants would still be free from responsibility on the doctrine of common employment. See the judgment of the House of Lords in *Hedley v. Pinkney & Sons S. S. Co.*, [1894] A.C. 222.

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BURTON, C.J.O.

The learned Chief Justice says: "In my opinion there was in this case evidence to go to the jury that the apparatus supplied for the purpose of the work on which the plaintiff was employed was insufficient and defective." With great deference the evidence is all the other way. These planks had been used for the scaffolding and had proved to be amply sufficient; they had not been supplied to be used for the purpose of the gangway, but when so used they were found to be quite suitable if they had been properly fastened; the insufficient nailing was wholly responsible for the accident.

If the jury had drawn any such inference as the learned Chief Justice suggests, I submit with great deference, but with equal confidence, that it could not have been sustained by the Court.

Then as to the statutory liability:—I would remark in the first place that the evidence is of a very hazy character as to the employment by the defendants of Sterzick as a foreman or superintendent, but however that may be there is nothing to show that he had any authority to depute Webster to act in his place.

I agree that the plaintiff was bound to furnish to the masons, as they required it, the mortar required in the course of the building, but to that extent only was he bound to obey their orders.

I do not enter into the question of whether a mason occupies a superior position to the plaintiff, and I have no

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BURTON, C.J.O.

knowledge as to their relative rates of pay. It is to my mind perfectly immaterial, and the answer is furnished by the extract given by Mr. Justice MacMahon from Lord Craighill's judgment in *Dolan v. Anderson* (1885), 12 Rettie 804.

There is not a particle of evidence from first to last to support a finding that Webster was a person to whose orders or directions the plaintiff was bound to conform.

I am painfully aware that the line of demarcation in those cases in which it becomes the duty of the judge to decide the preliminary question of whether there is any evidence proper to submit to a jury is sometimes very fine, but we are, I think, relieved of any such difficulty in this case, and there is not any evidence that I can see from first to last which would, in my judgment, warrant the inference which the learned Chief Justice thinks the jury might have drawn in this case against the defendants.

I do not know that I can more clearly express my views than in a quotation from the language of that very eminent judge, the late Mr. Justice Willes, when he says: "This is a clear exposition of the rule and it has been generally acquiesced in and acted upon, and it follows from it that although the question of negligence is usually one of pure fact, and therefore for the jury, it is the duty of the judge to keep in view a distinct legal definition of negligence as applicable to the particular case, and if the facts proved by the plaintiff do not, whatever view can be reasonably taken of them, or inferences drawn from them, present an hypothesis which comes within that legal definition then to withdraw them from their consideration." The learned Chief Justice admits that the only duty of the defendants was to supply proper materials, and there is not a word in the evidence to show that the materials were not sufficient; what room then is there for the jury being warranted in drawing the inference that they were insufficient? Upon the second ground, under the Act, it must be admitted that there would be no liability

on the part of the defendants unless Webster was a person in their service to whose orders the plaintiff was bound to conform. Working together in the joint work of building the wall, the plaintiff had necessarily to supply the mortar as and when it was required by the other workmen, but the orders or requisitions so to supply it manifestly are not orders or directions in the sense in which the words are used in the statute: *Snowden v. Baynes* (1890), 25 Q.B.D. 193.

I feel great difficulty in understanding that portion of the claim which places the right to recover upon the defect in the condition and arrangement of the ways, etc., connected with, intended for, and used, in the business of the defendants. I quite agree that a very wide construction should be placed upon the word "way" as used in this connection, and I notice that one learned Judge in England defined it, in the case of a workshop, as "any part of a workshop which a workman is required, or which it is his duty, to traverse upon the business of his employer:" *Willets v. Watt & Co.* (1892), 61 L.J.Q.B. at p. 545. Here the way, if a plank serving temporarily the purpose of a gangway can properly be so defined, was not connected with or used with the premises usually, or at any time until the morning of the accident, when Webster, without any communication with and without the knowledge of the defendants, devised it as a means to overcome the difficulty of which the plaintiff complained in the easy supply of the mortar. Whether if that had been done with the knowledge of the defendants it would have furnished a ground of action for having a defective way it is not necessary to enquire, but under any circumstances how can it be claimed that the defendants can be liable for the unauthorized act of Webster, or of the plaintiff and Webster combined, in devising a scheme for the delivery of the mortar? Assuming that this was the act of Webster alone, how was the plaintiff under any obligation to conform to the orders of Webster in using it? But then again

Judgment.

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where was the negligence of the employers or of some person in their service and entrusted by them with the duty of seeing that the ways, etc., were in proper condition?

Upon the point that even though the defect existed there was no negligence in the employer, see *Moore v. Gimson* (1889), 58 L.J.Q.B. 169.

Upon the whole I think that the learned Chancellor was right in holding that there was no evidence of negligence proper to submit to the jury, and that the judgment should not have been interfered with.

The appeal should, in my judgment, be allowed.

OSLER, J.A.:—

When Sterzick left the defendants' employment on the Saturday there ceased to be any foreman in connection with the work on which he had been engaged. The evidence only enables us to say that his employment had come to an end, and that he had been discharged by the defendants, if that makes any difference. The work was finished with the exception of the tuck pointing, to do which the two labourers, Webster the mason, and the plaintiff the hodman, only were needed, and I am unable to see that on the Monday their relative positions were different in any way from what they had been on Saturday, or that the former had become a person in the service of the employers to whose orders the plaintiff was bound to conform in any other way than had theretofore been the case, viz, by obeying his call or direction to bring mortar when it was needed. Beyond this he had no control over the plaintiff in his work. He could tell him what he was to do, *i.e.*, to bring the mortar, but had no authority to direct him how he was to bring it, or what way he was to use in doing so, and it is quite clear that the accident did not result from the plaintiff conforming to an order or direction to bring the mortar, although it happened while he was doing so. Therefore the third sub-section of section 3 of the Work-

men's Compensation for Injuries Act cannot be relied on. And it has not been argued, except by saying that Webster was a foreman, that Webster was a person in the service of the employers who had superintendence entrusted to him so as to bring the case within the second sub-section. And, in the absence of evidence from which a jury might properly infer that Webster had any authority, express or implied, from his employers to erect the "way," the defect in which was the cause of the accident to the plaintiff, assuming that Webster was the sole deviser and constructor thereof, the action cannot be supported under the first sub-section of section 3. I think, with all deference to the learned Judges of the Divisional Court, that the trial Judge took the right view of the evidence, and that his judgment ought to be restored.

Judgment.

OSLER, J.A.

MACLENNAN, MOSS, and LISTER, JJ.A., concurred.

*Appeal allowed.*

R. S. C.

## SMALL V. HENDERSON.

*Bankruptcy and Insolvency—Assignments and Preferences—Contestation of Claim—Dissentient Creditor—Composition—Fraud—Bills of Exchange and Promissory Notes—Endorsement.*

An insolvent made a compromise with his creditors, borrowing from his wife the money to pay the composition. She borrowed the money from one of his creditors, agreeing to pay a bonus of a large amount and giving to the creditor for his composition payment and the bonus her promissory notes endorsed by her husband, with a mortgage on her real estate, and a chattel mortgage on his stock, as collateral security. The creditor signed the composition agreement, nothing being said about the bonus to the other creditors, who knew, however, that some arrangement had been made with this creditor for the supply of the necessary funds. The insolvent, after carrying on business for some time and incurring further liabilities, made an assignment for the benefit of his creditors:—

*Held, per BURTON, C.J.O.*, agreeing with the judgment of MACMAHON, J., at the trial, that the transaction with the wife was valid and not a fraud on the composition, and that the creditor was entitled to rank upon the notes against the estate in the hands of the assignee as far as this question was concerned.

But the notes in question having been made by the insolvent's wife, payable to the creditor's order, and having been endorsed by the insolvent before they were handed to the creditor:—

*Held, per Curiam*, on objection taken in this Court, that the insolvent was not liable as endorser and that the creditor could not rank on his estate.

*Semle, per BURTON, C.J.O.* An objection on either ground to such a claim to rank cannot be taken under sec. 9 of the Act by a dissentient creditor for his own benefit against the wishes of the assignor and the majority of the creditors, and an order purporting to be made under that section allowing the dissentient creditor to contest the claim in the assignee's name is invalid.

Statement.

APPEAL by the defendant from the judgment at the trial.

The plaintiffs were merchants carrying on business at Montreal, and brought the action for a declaration of their right to rank against the estate of one E. D. Gough, in the hands of the defendant as assignee for the benefit of creditors, for the amount of certain promissory notes endorsed by Gough. The defendant counterclaimed for cancellation of the notes and for payment by the plaintiffs of sums paid to them by Gough.

Each of the notes in question was made by Gough's wife, payable to the order of the plaintiffs, and each note

had been, it was contended, endorsed by Gough before it was given to the plaintiffs.

Statement.

The action was tried at Toronto on the 16th of October, 1898, before MACMAHON, J., who, on the 25th October, 1898, gave the following judgment, in which the facts are stated :

MACMAHON, J. :—

In April, 1896, one E. D. Gough, who carried on business as a shopkeeper at Belleville, was in financial difficulties, and his business was being conducted in a manner unsatisfactory to his creditors and causing great anxiety to his wife, and she went from Belleville to Montreal to see the plaintiffs for the purpose, if possible, of inducing them to render such financial assistance as would enable her to purchase the stock and gain control of the business.

The plaintiffs, who were largely interested as creditors of Gough, had at that time no intention of allowing him to continue in business. In a memorandum given at that time to Mrs. Gough by Mr. Dobbin, a member of the plaintiff firm, the firm agreed to make an advance up to 62½ cents on the dollar on her husband's stock, in the event of an assignment for the benefit of creditors being made and the stock being sold, to enable her to purchase it, she to give to them her notes at two, four, and six months, which they agreed to discount at 7%. They stipulated that should the advance be made, the dividend coming to her as a creditor, on a claim against her husband's estate, should be paid to them and applied on the first note, and that they should have a chattel mortgage on the stock, and security on the real estate owned by her in Belleville, and also an assignment of insurance policies on her husband's life of which she was the beneficiary.

There is no question that this was an agreement which it was competent for the plaintiffs and Mrs. Gough to enter into, and if it had been carried out no creditor of Gough could have raised any valid objection thereto.



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MACMAHON, J.

Gough, however, interfered, and dissuaded his wife from carrying out that arrangement. She assented to withdraw providing he was able to secure a compromise with his creditors, in that event some other arrangement being made by which the amount required to pay the composition to the creditors could be raised.

Gough's creditors were then called together and the plaintiffs were represented by their solicitor at the meeting, at which an offer of Gough to compromise was made. Gough made alternative offers, the one of forty cents on the dollar, thirty cents payable in twenty days and ten cents payable in six months, or thirty-five cents, payable in cash within twenty days from the date of the deed of composition, and the alternative offers were embodied in a composition deed, which is dated the 9th of April, 1896. This deed the plaintiffs executed.

It was known to the creditors that Mrs. Gough was endeavouring to obtain from the plaintiffs the amount with which to pay the composition, but the terms upon which they were likely to make the advance were not communicated to the other creditors, the agreement as to such advance not being executed until the 29th of April. The creditors were, therefore, not aware that the plaintiffs were, by the contract with Mrs. Gough, obtaining, as was urged by counsel for the defendant, an advantage over the rest of Gough's creditors. But that I conceive cannot under the contract make any difference as to the right of the plaintiffs to rank on Gough's estate.

This agreement of the 29th April between the plaintiffs and Mrs. Gough, under which they agreed to make the advances, recites:—"Whereas the parties of the first part (plaintiffs) have agreed to advance and lend to the party of the second part (Mary R. Gough) \$6,790 to enable her to lend the same to her husband, E. D. Gough, to pay off his creditors and carry on his business, and in consideration of such advance the said Mary R. Gough has agreed to pay the said plaintiffs \$3,210, the said sums

of \$6,790 and \$3,210 aggregating in all \$10,000 ; the said sum of \$10,000 is to be paid by the party of the second part giving to the parties of the first part five promissory notes for principal of \$2,000 each, made by her payable in two, four, six, eight and ten months respectively with interest," etc.

There are covenants on behalf of Mrs. Gough to secure payment by a mortgage on her real estate and the assignment of policies of life insurance.

By the terms of this agreement, and the giving of the promissory notes by Mrs. Gough endorsed by her husband, she became the principal debtor and he became surety for her.

Payments were made to the plaintiffs by Gough from time to time on account of the notes, and at the time of the bringing of the action they held four notes, upon which there was due, with interest to the date of the assignment, \$6,417.10.

The plaintiffs credited Mrs. Gough with the proceeds of the notes, paid her in cash \$4,655.01, and charged against the balance the amount due to them by Gough, writing off a small sum to profit and loss.

Gough made an assignment for the benefit of his creditors to the defendant on the 13th of September, 1897. E. Boisseau & Company, and Wyld, Grasett & Darling, who were not creditors of Gough at the time of the compromise with his creditors in 1896, but were creditors at the time of Gough's assignment in September, 1897, moved and seconded a resolution requiring the defendant, as assignee of Gough's estate, to contest the right of the plaintiffs to be collocated on the dividend sheet.

The majority were against the motion and Boisseau & Company, and Wyld, Grasett & Darling then applied to the Judge of the County Court of York and obtained, on the 15th of October, 1897, an order allowing them to contest the claim at their own expense and for their own benefit, and to take proceedings by action, set-off, or

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MACMAHON, J.

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counterclaim to recover any moneys received by the plaintiffs in fraud of the composition.

Neither Gough nor his wife made any objection to the plaintiffs ranking on the estate for the amount of their claim as filed with the assignee.

Notice, in the assignee's name, of contestation of the plaintiffs' claim was given on the 16th of October, 1897, and this action was brought on the 22nd of October, 1897.

After the composition deed was executed on the 9th of April, 1896, by the plaintiffs and the other creditors of Gough, he had twenty days in which to raise the amount required to pay the composition, and was at liberty to procure on the best terms possible the amount required to meet the agreed composition.

If the \$6,790 had been procured by Gough himself from a person not then a creditor on the like terms as those upon which the plaintiffs advanced it to his wife, the transaction, it is admitted, would have been unassailable.

Mrs. Gough, however, entered into the contract whereby the advance was obtained. She gave security for the sum advanced, and for the amount of the bonus agreed to be paid, and every creditor of Gough received in payment and satisfaction of his claim the amount of his composition under the terms of the composition deed.

Having regard to the contract, neither Mrs. Gough, the maker, nor Gough, as the endorser, of the promissory notes given to the plaintiffs could have successfully resisted payment thereof. Reference may be had to the judgment of Osler, J.A., in *Segsworth v. Anderson* (1894), 21 A.R. at p. 248.

Even had the agreement between the plaintiffs and Mrs. Gough been tainted with fraud, and therefore voidable at the instance of any of the then existing creditors of Gough, it could have been voided only by restoring the plaintiffs to their *status quo*, that is, by refunding to them the \$6,790 which they advanced, and which sum passed into the hands of Gough's creditors: *Clarke v. Dickson*

(1858), E. B. & E. 148, which is quoted with approval in *Sheffield Nickel Company v. Unwin* (1877), 2 Q.B.D., at p. 223. See also *Campbell v. Hally* (1895), 22 A.R. 217.

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MACMAHON, J.

As a matter of fact no creditor of Gough was defrauded. Had the stock been sold at 62½ cents on the dollar and thus realized \$12,000, it would not, after paying the expenses of winding up the estate, have paid the creditors forty cents on the dollar, as the total liabilities (including therein the claim of Mrs. Gough) amounted to \$30,000. So that the creditors were paid all that they would have received had there been a realization of the estate by a sale of the stock.

Such cases as *Ex parte Phillips* (1888), 36 W.R. 567; *Knight v. Hunt* (1829), 5 Bing. 432, and *McKewan v. Sanderson* (1875), L.R. 20 Eq. 65, have no application whatever to the present case.

As according to my view the creditors of Gough who were such on the 9th of April, 1896, when the composition deed was executed, could not successfully impeach the transaction as being a fraud against them, then certainly the creditors of Gough who became such subsequent thereto, or the defendant as assignee of the estate, could not successfully do so.

There must be judgment for the plaintiffs declaring their right to rank upon the estate for the amount of the promissory notes mentioned in the statement of claim and protest charges and interest to the date of the execution of the assignment, together with their costs.

The defendant's counterclaim is dismissed with costs.

The appeal was argued before BURTON, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, J.J.A., on the 21st of March, 1899.

*George Kappeler*, and *James Bicknell*, for the appellant. There is no doubt on the evidence that this is an attempt to disguise the true nature of the transaction, which was the plain case of publicly accepting a composition and



## Argument.

secretly stipulating for an increased amount. The substance and not the form of the transaction must be looked at: *In re Watson* (1890), 25 Q.B.D. 27; *Madell v. Thomas*, [1891] 1 Q.B. 230. Gough could have repudiated liability on the notes because of the fraud, and his assignee is now entitled to raise the objection: *Weese v. Banfield* (1895), 22 A.R., at p. 493. It makes no difference that the secret payment was to be made not by the insolvent but by his wife: *In re Cross* (1848), 4 DeG. & Sm. 364; or was to be made as a bonus for advancing the money to pay the other creditors: *Wood v. Barker* (1865), L.R. 1 Eq. 139. The consideration being in part illegal the notes are void: *McKewan v. Sanderson* (1875), L.R. 20 Eq. 65; *Howland v. Grant* (1896), 26 S.C.R. 372. Even if all those who were creditors of Gough at the time the composition agreement was entered into acquiesce the transaction cannot stand; the subsequent creditors have the right to complain, and the appellant, as their trustee, is bound to contest the claim.

*Clute*, Q.C., and *J. G. Hay*, for the respondents. The facts do not bring the case within the authorities as to frauds on compositions, and the appellants' arguments are beside the question. This was a transaction between the plaintiffs and the insolvent's wife—a loan of money to her on certain terms; and what she chose to do with that money was no concern of theirs, and their profit in the transaction is no concern of the creditors who have instigated this attack. At any rate that attack must fail for there has been no offer to place the plaintiffs in their original position: *Campbell v. Hally* (1895), 22 A.R. 217; *Sheffield Nickel Company v. Unwin* (1877), 2 Q.B.D. at p. 223. Such an objection as this is not one which creditors can raise upon the assignee's refusal to do so, and the order allowing the plaintiffs' claim to be contested is invalid. Even if the transaction is treated as one between the plaintiffs and the insolvent it is valid: *Re Russell* (1882), 7 A.R. 777; *Samuel v. Fairgrieve* (1894,) 21 A.R. 418.

Argument.

*Bicknell*, in reply. The order for contestation is valid; this is a "proceeding," and the assignee having refused to take it, the dissatisfied creditors are entitled to the order. The assignee has, moreover, acquiesced in the order and has accepted service of process, and no one else can complain. Apart from any question as to the composition the plaintiffs must fail, for the notes were endorsed by Gough before the plaintiffs became holders of them, and they cannot recover against him as endorser: *Robertson v. Davis* (1897), 27 S.C.R. 571; *Jenkins v. Coomber*, [1898] 2 Q.B. 168; *Duthie v. Essery* (1895), 22 A.R. 191; *Steele v. McKinlay* (1880), 5 App. Cas. 754.

*Clute*, (by leave, as to the form of the notes). The appellant should not be allowed to raise this question at this stage. There is nothing in the objection; the liability depends upon the intention, and here the intention is clear *Macdonald v. Whitfield* (1883), 8 App. Cas. 733.

June 29th, 1899.\* BURTON, C.J.O.:—

It appears to me, although I do not fancy it is now a matter of much importance, that the two creditors who set this contestation in motion misapprehended their rights in making an application to the County Court Judge.

The section under which the application was made to the County Court Judge applies, in my opinion, to cases in which there is an impeachable transaction alleged to be made or entered into in fraud of creditors, which certain of the creditors desire to test, which the assignee declines to take proceedings to impeach.

If the assignee is satisfied with the claim sought to be proved, the debtor may still be heard to dispute it, and may apply to the judge for an order requiring the assignee to serve a notice of contestation, but the judge shall only

\* The respondents offered no further evidence as to the time at which the notes had been endorsed, and in July, 1900, notice was given to the Court that the action had been settled. The judgments were then handed out to the Reporter.—Rep.

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BURTON, C.J.O.

make such order if, after notice to the assignee, he is of opinion that there are good grounds for contesting the claim, or, if the claimant consents in writing, the judge may in a summary manner decide the question of its validity.

Here, neither the assignee nor the debtor nor the general body of creditors desired to contest the claim, and whatever may be the remedy, if any, in such a case, I do not think that the County Court Judge had any jurisdiction to make the order he did.

However that may be, the case was brought down to trial.

I can quite understand those cases in which a debtor, pretending to accept a composition, and thereby drawing in other creditors to accept less than their full debts by holding out that he, one of the largest creditors, would submit to a similar loss for the general benefit, and yet secretly stipulating for payment in full, has been held guilty of a fraud, and in which an attempt to enforce such an agreement has failed, there being no consideration for it; so that if the endorsement in the present case could not have been enforced before the assignment, neither can this claim be provable against the estate. I agree also that whatever device or scheme may be resorted to to cover up the transaction, if substantially that is shewn to be its true nature, it will not be enforced in a court of law.

But is this a case of that kind? After a careful consideration of the evidence, I have come to the conclusion that it is not.

At the time of the first failure, Mrs. Gough was very desirous that her husband, whose habits rather unfitted him for business, should retire, and she wished to obtain a loan of money to enable her to purchase the stock when brought to the hammer by the assignee, and she then applied to the plaintiffs to assist her for that purpose. They agreed to advance her enough to purchase the stock at 62½ cents on the dollar, but at the last moment Gough

refused to retire, and the creditors preferred apparently to accept the composition to that mode of closing the estate.

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BURTON, C.J.O.

If that had been carried out, the transaction between Mrs. Gough and the plaintiffs would have been unassailable.

When, through no fault of hers, that arrangement fell through, she again applied to the plaintiffs to borrow money to pay the composition, which they consented to lend upon certain terms, including security from her on her own property, and as the stock was to remain in the husband, his endorsement of the notes which she was to give to secure the payment of the advance.

It is not in any way proved that the other creditors were induced to accept the composition by any representation of Mrs. Gough or her husband. On the contrary, her wish was not that the composition should be carried out, but that the business should be transferred to her. His endorsement was asked for because he was retaining the stock, and it certainly cannot be said that the notes or the endorsements were without consideration. She, in good faith, paid the composition which enabled him to continue the business, and without any intention to defraud any one.

The creditors all knew that Gough could not pay the composition unless a loan could be obtained from some one, and I think it is a perfectly fair inference that they also knew that the plaintiffs were the parties making the advance. Not one of the creditors was deceived, but all voluntarily assumed the position that they preferred the composition to the amount to be derived from a sale. I do not wonder, therefore, that the assignee and creditors under the last assignment declined to contest the claim.

The learned trial Judge has come to the conclusion that there was no fraud in the transaction, and I agree with him, and it is only now, when we are called upon to interfere with his decision, that the proceedings of the County Court Judge become important. I think, with great respect, that there was no jurisdiction in the learned



Judgment.

BURTON, C.J.O.

County Court Judge to make the order which the assignee has acted upon, and therefore that the contestation was not warranted.

At the hearing one of my learned brothers enquired how the notes were endorsed, and upon their production it appeared that they were signed by Mrs. Gough as maker, payable to the plaintiffs as payees; indorsed by them, and subsequently indorsed by E. D. Gough. It was then, for the first time, objected that there could be no recovery against him, as he could in turn recover against them as prior indorsers on the notes; and *Robertson v. Davis* (1897), 27 S.C.R. 571, and *Steele v. McKinlay* (1880), 5 App. Cas. 754, were relied on.

"If a bill be re-indorsed to a previous indorser, he has, in general, no remedy against the intermediate parties, for they would have their remedy over against him, and the result of the actions would be, to place the parties in precisely the same situation as before any action at all. But where a holder has previously indorsed, and the subsequent intermediate indorser has no right of action or remedy on that previous indorsement against the holder, these are cases in which the holder may sue the intermediate indorser:" Byles on Bills, 15th ed., p. 178. The object of this rule of law was to prevent circuitry of action.

In some of the earlier cases this was effected by the payees and first indorsers adding the words "*sans recours*" to their indorsement, but this is clearly unnecessary where the facts can be shewn, as here, that it was agreed that the husband should become security for the payment of the note, and could not therefore maintain an action against the plaintiffs as prior indorsers. The case of *Ridout v. Bristow* (1830), 1 Cr. & J. 231, is an authority to shew that a promissory note is binding, although it purports, on the face of it, to be given for the debt of another.

It has long been established as law, both in England and this Province, that under such circumstances the indorser is liable to a subsequent holder, which these

plaintiffs are. *Wilders v. Stevens* (1846), 15 M. & W. 208; *Smith v. Marsack* (1848), 6 C.B. 486; *Morris v. Walker* (1850), 15 Q.B. 589; *Duthie v. Essery* (1895), 22 A.R. 191; may be referred to. In *Wilkinson v. Unwin* (1881), 7 Q.B.D. 636, Bramwell, L.J., says: "The only difficulty, which I have felt, is that some expressions in the opinions of the Lords in *Steele v. McKinlay* (1880), 5 App. Cas. 754, may be inconsistent with the reasoning of my judgment in this case; but I am satisfied that it was not the intention of the House of Lords to over-rule either the three English cases which I have mentioned, namely, *Wilders v. Stevens* (1846), 15 M. & W. 208; *Smith v. Marsack* (1848), 6 C.B. 486, and *Morris v. Walker* (1850), 15 Q.B. 589; or the two cases decided in the Supreme Court of New York: *Seabury v. Hungerford* (1841), 2 Hill 80; and *Hall v. Newcomb* (1842), 3 Hill 233."

If the payees had not indorsed this bill, this case would be similar to *Jenkins v. Coomber*, [1898] 2 Q.B. 168, being a case of an incomplete instrument. The notes, when first produced, appeared all in order, bearing first the payees' indorsement and then the indorsement over by Gough to the same persons, and upon that state of facts, if they had proved to be facts, I think there would be no difficulty in the plaintiffs' recovery, but when we come to read the evidence with the letter of the solicitors, enclosing the notes to the plaintiffs, it is impossible, I think, to resist the conclusion that the notes at that time bore the signatures only of Mrs. Gough and her husband, and that he never was therefore, according to the law merchant, a party to the bill, and cannot be sued upon it.

I regret this, because I cannot bring myself to the conclusion that there is anything fraudulent in the transaction, but under these facts there is no liability of the indorser in law, and we shall have to allow the appeal; but, as the point was not taken at an earlier period, it should be without costs.

Judgment.

BURTON, C.J.O.

Judgment.

OSLER, J.A.

OSLER, J. A. :—

The only point at present necessary to be decided is whether the notes on which the plaintiffs seek to rank on the estate of E. D. Gough, in the hands of the defendant, his assignee, were endorsed by him to the plaintiffs. If they were not endorsed to them in the sense attached to that term by the Bills of Exchange Act, they cannot recover.

It has been made quite clear upon the evidence, that the notes, of which the notes now in question are renewals, were not endorsed by Gough, the insolvent, to the plaintiffs. They were notes made by Mary Gough, payable to the plaintiffs or order, and E. D. Gough, the insolvent, placed his name upon the back of them, doubtless with intent to become security, but before they had been transmitted to the plaintiffs, that is to say, before the plaintiffs had become the holders of or endorsed them, and therefore before they were complete and regular instruments. The renewals, so far as we can see from the evidence, were made and the insolvent's name placed thereon in the same manner, and one of them has not been endorsed by the plaintiffs at all. As this difficulty in the way of the plaintiffs' recovery was only pointed out on the argument, I think it would be proper to give them an opportunity, if they desire it, to give evidence on this point, in order to take the case if they can out of the rule laid down in such cases as *Jenkins v. Coomber*, [1898] 2 Q.B. 168; *Steele v. McKinlay* (1880), 5 App. Cas. 754; *Lecan v. Kirkman* (1859), 6 Jur. N.S. 17; *Macdonald v. Whitfield* (1883), 8 App. Cas. 733. The question of liability upon the endorsement may then, I think, properly be argued before us at large, having regard to the above cases and to *Ayr American Plough Co. v. Wallace* (1892), 21 S.C.R. 256, which seems inconsistent with them, and *Robertson v. Davis* (1897), 27 S.C.R. 571; and *Duthie v. Essery* (1895), 22 A.R. 191.

If the plaintiffs do not take advantage of this permission the appeal must be allowed and the action dismissed.

MACLENNAN J.A. :—

Judgment.

MACLENNAN,  
J.A.

I agree.

MOSS, J.A. :—

Upon the argument of this appeal the appellant's counsel attacked the judgment upon two grounds.

Their first contention was, that upon the facts as disclosed by the evidence, the transaction upon which E. D. Gough became a party to the four promissory notes, was an attempt on the part of the plaintiffs to secure payment of the balance of their claim against him in excess of a composition which they, along with the other creditors, had agreed to accept, and in consideration of which they had, with the other creditors, executed a deed of discharge.

Towards the close of the argument they raised another contention which had not been touched upon before, viz., that the notes in question were made by one M. R. Gough, the wife of E. D. Gough, in favour of the plaintiffs as payees, and that E. D. Gough's signature was put upon the back before they had been received by the plaintiffs or endorsed by them. The learned trial Judge's attention was not called to this phase of the case, but the objection appears to be open to the defendant upon the pleadings and evidence. See *Robertson v. Davis* (1897), 27 S.C.R. 571.

If the case fell to be determined on the first point, I should feel difficulty in giving effect to the contention that there was a good and valid consideration for Gough's endorsement. As I see the matter at present, the transaction, though ingeniously cloaked and made to wear another guise, presents the appearance of an arrangement by which Gough was to assume a liability to pay or make good to the plaintiffs the difference between the composition which they received with the other creditors, and in consideration of which they executed the deed of composition and discharge, and the whole amount of their original claim.



Judgment.

Moss, J.A.

There are strong circumstances supporting the defendant's contention in that respect, but it is not necessary to finally determine the question, for upon the other point the defendant appears entitled to succeed.

The plaintiffs are the payees of the notes, and are maintaining this action upon them, seeking to charge with liability the estate of E. D. Gough, whose name appears written across the back of them.

But he endorsed, or rather placed his name upon them, before the plaintiffs had become holders or endorsers.

They were not then completed, negotiable instruments, and the Bills of Exchange Act, 1890, does not assist the plaintiffs.

The case is not readily distinguishable from *Steele v. McKinlay* (1880), 5 App. Cas. 754, and *Jenkins v. Coomber*, [1898] 2 Q.B. 168.

The notes now sued on are renewals of the notes originally given. Upon the argument no state of circumstances was suggested differing them from the original notes in respect of the manner of E. D. Gough placing his name on them. I agree, however, that the plaintiffs should be afforded an opportunity of showing such circumstances, if they exist, and that in that case the question of liability upon the endorsement be left for further argument.

The plaintiffs, in addition to supporting the judgment upon the grounds taken by the learned trial Judge, objected that the notice of contestation given on behalf of the defendant in the insolvency proceedings was improper and unwarranted. The argument is that the notice was given in obedience to an order of the County Court Judge, made upon the application of Boisseau & Co., and Wyld, Grassett & Darling, creditors of E. D. Gough, and that the Judge had no jurisdiction to make the order.

At the trial the plaintiffs' counsel put in the promissory notes and closed their case.

Their first exception to the notice and order was made when the defence opened.

If the objection was good, the action ought to have been dismissed, for the only warrant for bringing it was that the defendant did notify the plaintiffs under the provisions of the Assignments and Preferences Act that their claim was contested.

The statement of claim sets forth that the plaintiffs furnished to the defendant particulars of their claim against the insolvent, E. D. Gough, upon the said promissory notes, and that on or about the 16th of October, 1897, the defendant served upon them a notice of contestation of their claim.

Thereupon the action was commenced, pursuant to the provisions of the Act, R.S.O. cap. 147, secs. 21 and 22.

It was not brought to determine the validity of the notice or order, and the question is not really before us. There appears to have been a notice of contestation served upon the plaintiffs in the form and manner directed by the Act. The plaintiffs must rely upon the notice as the foundation of and justification for this action. The defendant is here defending the action through solicitors, and we must assume that the defence is being conducted for the defendant in furtherance of the notice of contestation.

I do not see that we are in a position to enquire into the proceedings that led to the notice, or called upon to say whether they were right or wrong.

LISTER, J.A. :—

I agree with my brother Moss.

*Appeal allowed.*

R. S. C.

Judgment.  
Moss, J.A.

## REGINA v. DAVY.

*Criminal Law—Trespass—Damage to Property—“Fair and Reasonable Supposition of Right”—R.S.O. ch. 120, sec. 1—Criminal Code, sec. 511—Water and Watercourses—Access to Shore—Crown Grant.*

The honest belief of a person charged with an offence under R.S.O. ch. 120, sec. 1 (unlawfully trespassing), or the Criminal Code, sec. 511 (wilfully committing damage to property), that he had the right to do the act complained of, is not sufficient to protect him; there must be fair and reasonable ground in fact for that belief.

The usual reservation in a patent of land bounded by navigable water of “free access to the shore for all vessels, boats and persons,” gives a right of access only from the water to the shore, and in this case it was held that a person who had broken down fences and had driven across private property to the shore, could not successfully assert, when charged under R.S.O. ch. 120, sec. 1, and the Criminal Code, sec. 511, that he had “acted under a fair and reasonable supposition of right” in so doing.

Judgment of a Divisional Court affirmed.

## Statement.

APPEAL (by leave) by the defendants from the judgment of a Divisional Court [ARMOUR, C.J., and STREET, J.].

The defendants were charged, upon the information of Levi Sager, before the Police Magistrate at Napanee, for that they “unlawfully did . . . trespass in and upon the west two-thirds of Lot 9 in the First Concession of the Township of Richmond, in the County of Lennox and Addington, and did do damage to certain fences and fence posts.” The complainant was the owner of the land mentioned in the information, which was bounded on one side by the Napanee River, and the defendant Samuel Davy was the owner of, and lived upon, an island in that river, immediately in front of the complainant’s land. The defendant’s contention was, that he was entitled to drive along the beach or shore of the complainant’s property, in order to reach a highway, which ran to the water’s edge of the Napanee River, a short distance to one side of the complainant’s land. This right had been asserted for some time by the defendant, and he had already been convicted for trespass in attempting to

exercise it. Upon the occasion now in question, having previously taken counsel's advice, he drove along the beach, and took down at each side of the complainant's land, a fence erected there by him. He and those who were with him were then proceeded against, and the magistrate, after hearing the evidence, intimated that he would convict. The defendants obtained from ROSE, J., an order, prohibiting the magistrate from proceeding further, but this order was reversed by the Divisional Court. The patent of the complainant's land contained a reservation of "free access to the beach for all vessels, boats, and persons."

The appeal was argued before BURTON, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 30th and 31st of May, 1900.

*Clute*, Q.C., and *G. F. Ruttan*, for the appellants. This case comes clearly within the exceptions in R.S.O. ch. 120, sec. 1, and the Criminal Code, sec. 511, for the appellants had a fair and reasonable supposition that they had a right to do the act complained of, and there was an absence of any criminal intent: *Watkins v. Major* (1875), L.R. 10 C.P. 662; *Dickenson v. Fletcher* (1873), L.R. 9 C.P. 1. There was a *bonâ fide* assertion of a right, and the magistrate could not try the question of title: *Regina v. Davidson* (1880), 45 U.C.R. 91. The facts that counsel was consulted, and that the act complained of was deliberately done, asserting a title, are sufficient to bring the appellants within the exception: *Regina v. McDonald* (1886), 12 O.R. 381; *Kinnersley v. Orpe* (1780), 2 Dougl. 516; *Hunt v. Andrews* (1820), 3 B. & Ald. 341; and this is true even if the appellants were mistaken: *Rex v. Speed* (1700), 1 Ld. Raym. 583; Paley on Convictions, 7th ed., p. 145. The reservation in the patent gives the right contended for.

*Aylesworth*, Q.C., and *J. H. Madden*, for the respondent. The jurisdiction of the magistrate depended upon a question of fact, which he was competent and bound to



## Argument.

determine, and his finding of fact in favour of his jurisdiction cannot be reviewed in proceedings by way of prohibition: *Regina v. Malcolm* (1883), 2 O.R. 511; *White v. Feast* (1872), L.R. 7 Q.B. 353; Paley on Convictions, 7th ed., p. 150. It is not sufficient for the person prosecuted under the statutes in question to shew that he acted in the *bonâ fide* belief that he had the right to do the act complained of. He must satisfy the magistrate that he had fair and reasonable grounds for entertaining such a belief: *Regina v. Mussett* (1872), 26 L.T.N.S. 429. The reservation in the patent is for benefit of persons exercising the right of navigation.

*Clute*, in reply.

June 29th, 1900. The judgment of the Court was delivered by

LISTER, J.A. :—

The papers filed do not inform us whether the information was laid under sec. 1 of R.S.O. ch. 120, or under sec. 511 of the Criminal Code, but I assume, from its language, that it was laid under both sections.

By the former section jurisdiction is given to a justice of the peace to hear and determine in a summary way, a charge for unlawfully trespassing; and by the latter section the same jurisdiction is given in respect of a charge for wilfully committing any damage to, or upon, any real or personal property. Both sections withhold such jurisdiction if the person charged "acted under a fair and reasonable supposition that he had the right to do the act complained of."

The respondent at the time the alleged trespasses were committed, was the owner and in possession of the lands in question, which extended to the water's edge of the Napanee River.

The appellants, in order to enable them to get to a point on the shore of such river east of the respondent's

lands, and claiming the right to cross his lands for such purpose, broke down a part of his west fence, at a point 32 rods north from the water's edge of the river, and drove upon and across his lands, to the fence on the east side thereof, which, at a point 132 rods north from the water's edge of the river, they also broke down.

Their claim was, that they had a lawful right so to do, under a reservation in the grant of such lands from the Crown, which reserved, as they claimed, for the use of the public, a strip of land sufficient for access to the waters of the said river. The grant, however, contains no such reservation, and, even if it did, it is apparent that the appellants, in committing the trespasses complained of, could not have been acting in the *bonâ fide* exercise of any right which such a reservation could give them in common with the general public. It does contain the usual reservation of free access to the shore for all vessels, boats, and persons, and under this reservation, the appellants in common with the public have an undoubted right to come to the shore from the water, but, in my opinion, it gives them no right of access to the shore from the land, by passing over or across the lands of an adjoining proprietor. It is, therefore, plain that they were not, as of right, entitled to do that which is complained of. The appellants, however, do not now insist on the claim of right then set up, but say that they acted under a fair and reasonable supposition of right, and the reservation in the patent from the Crown of free access to the shore for all vessels, boats and persons is pointed to as affording some evidence that they so acted, and they contend that the magistrate's jurisdiction to hear and determine the complaint is therefore ousted. It is, I think, settled that an honest belief on the part of a person charged under either section, that he had the right to do the act, does not oust the magistrate's jurisdiction. What the sections require in order to oust the jurisdiction of the magistrate is, that the act shall be done under a fair and reasonable supposition of right.

Judgment.

LISTER, J.A.

Judgment.

LISTER, J.A.

Whether such a supposition is warranted is for the magistrate to determine upon the evidence.

In *White v. Feast* (1872), L.R. 7 Q.B. 353, Cockburn, C.J., in speaking of a similar proviso in section 52 of 24 & 25 Vict. ch. 97, the English Act respecting wilful and malicious injury to property, said: "By that section a person is made liable to be summarily convicted who has committed, either wilfully or maliciously, damage or injury to property; and by the proviso such *prima facie* wrongdoer is not entitled to call upon the magistrates to hold their hands, unless he gives them sufficient evidence to convince them that he acted under a fair and reasonable supposition that he had a right to do the act, although he may have honestly believed that he was justified in doing the act. That is, the Legislature have chosen to put a different restriction upon the jurisdiction of the justices from that which would otherwise have been implied, inasmuch as they have expressly enacted, that in order to oust the justices' jurisdiction there must have been a *fair and reasonable ground for the supposition of the right*. The Legislature, therefore, having expressly stated the limit, it is not for us to impose any other limit; the express restriction supersedes the implied restriction."

In the present case it seems to me that the evidence leads irresistibly to the conclusion that the appellants had no ground whatever for supposing they had a right to enter upon the respondent's lands at the places where the trespasses complained of, are alleged to have been committed.

I do not agree with the contention, that a magistrate's finding of fact in favour of his jurisdiction is in no case subject to review. The rule is laid down by Cockburn, C.J. in *White v. Feast* (1872), L.R. 7 Q.B. 353, in these words: "I quite agree that magistrates cannot give themselves jurisdiction or retain jurisdiction by finding a particular fact one way, if the evidence is clearly the other way."

As to the other objections raised and discussed, they are not, in my opinion, fatal to the magistrate's jurisdiction.

I, therefore, do not deem it necessary to enter into a consideration of them.

Judgment.

LISTER, J. A.

It follows that the appeal must be dismissed.

See *Howe v. Stawell* (1833), Alcock & Nap. 348; *Blundell v. Catterall* (1821), 5 B. & Ald. 268; *Hargreaves v. Diddams* (1875), L.R. 10 Q.B. 582; *Watkins v. Major* (1875), L.R. 10 C.P. 662; *Denny v. Thwaites* (1876), 2 Ex. D. 21; *Reece v. Meller* (1882), 8 Q.B.D. 626; *Ex parte Vaughan* (1866), L.R. 2 Q.B. 114.

*Appeal dismissed.*

R. S. C.

# MYERS V. BRANTFORD STREET RAILWAY.

## *Street Railways—Negligence—Frightening Horses.*

The plaintiff, who was driving a carriage with a pair of horses, stopped near a railway crossing to allow a train to pass. An electric car of the defendants coming in the opposite direction stopped on the other side of the railway crossing for the same reason. The plaintiff's horses were frightened by the train and became restive, and after the train passed the plaintiff waved his hand to the motorman of the electric car as a signal, as he contended, not to start the car. The horses were apparently under control and the motorman started the car, when the horses became frightened again and ran away :—

*Held*, that as the plaintiff's signal was ambiguous, and as there was apparently no danger, the motorman could not be said to have been guilty of negligence, and therefore that the defendants were not liable.

Judgment of a Divisional Court, 31 O.R. 309, reversed.

AN appeal by the defendants from the judgment of a Divisional Court [ARMOUR, C.J., FALCONBRIDGE, and STREET, JJ.], reported 31 O.R. 309, was argued before BURTON, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, JJ. A., on the 18th of May, 1900.

Statement.

*J. A. Paterson*, for the appellants.

*Brewster*, Q.C., for the respondent.

June 29th, 1900, BURTON, C.J.O.:—

I agree with the judgment of STREET, J., in the Court below, upholding the ruling of the learned Chancellor at



Judgment.

BURTON, C.J.O.

the trial that no cause of action had been established and dismissing the plaintiff's action, and I could not profitably add anything to what he has said in support of that view of the law.

I think, therefore, that the appeal should be allowed.

OSLER, J.A.:—

The difficulty in this case is to put one's finger upon any distinct evidence of negligence on the part of the motorman in charge of the defendants' car. The car was standing on its track close to one side of the Grand Trunk Railway crossing and the plaintiff's team was also standing about 44 yards distant from the crossing on the other side waiting for a freight train to pass. The whistle of the approaching train had startled the team a little, but the plaintiff had controlled them, and when the train had gone by they were standing quietly. The plaintiff threw up his hand as a signal, he says, for the motorman to stop or not to start. The motorman was then standing, one foot on the sill and the other on the step of the car, and as soon as the plaintiff made the motion he tapped the gong and started the car. The plaintiff at the same time started his team, and the car and the team came almost alongside each other when the former had got about 25 yards from the crossing. The car was going at an ordinary rate of speed, neither very fast nor very slow. The gong was not sounding nor anything unusual being done, but from the time the horses began to approach the car they were manifesting signs of alarm, and when they came alongside they broke away and the plaintiff was ultimately thrown out and injured. There is nothing else in the case, and no evidence of unusual danger in the surroundings, either of time or place, as in the case relied on of *Lines v. Winnipeg Electric Street R. W. Co.*, (1896), 11 Man. L.R. 77. The learned Chancellor, the trial Judge, dismissed the action, holding that there was no evidence of negligence proper to be

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OSLER, J.A.

submitted to the jury, and with him agreed Street, J., in the Divisional Court, differing from the two other learned Judges in that Court who set aside the judgment at the trial. The inclination of my mind is, I must say, to agree with the two learned Judges who were of opinion that no sufficient case of negligence had been established. The plaintiff contended that the motorman should have stopped or not started the car, and should have regarded his signal as intimating a signal or warning to take one of these courses, but I do not think that is the reasonable inference, even if the motorman was bound to comply with a request to stop the car merely because the team appeared to be restive. He was, no doubt, bound not to do anything unusual or unnecessary, such as sounding the gong loudly or going at an excessive rate of speed, but was he bound to assume that the plaintiff could not have his horses under control so as to pass his car safely on a street of ordinary width and free from other elements of danger? The signal was, as some of the Judges in the Courts below have said, equivocal, and might well have been understood by the motorman in a sense different from that in which the plaintiff says he gave it. And if the same motorman's conduct on a previous occasion when the same team was approaching his car is any index of what he understood by it, that is the reasonable inference, because on that occasion he stopped when he was requested to do so, as he might perhaps have done again had the signal been interpreted by a call, which it was not. On the whole, I think that there was nothing for the jury, and that the judgment at the trial was right.

MACLENNAN, MOSS, and LISTER, JJ.A., concurred.

*Appeal allowed.*

R. S. C.

## STROUD V. WILEY.

*Partnership—Purchase of Partner's Interest by Co-Partners—Errors in Statements—Fraud.*

In order to avoid a dissolution of partnership and a winding up of the business, the interest of a partner in the partnership assets was purchased by his co-partners for an amount equal to the profits standing at his credit, his salary to the time of the purchase, and a percentage of his capital as shewn in the last yearly balance sheet, which was based upon statements prepared under the supervision of this partner. More than two months after the transaction, the plaintiffs brought this action, alleging that part of the stock-in-trade had been over-valued in the statements and claiming repayment of part of the purchase money :—

*Held*, upon the evidence, that the purchase price was arrived at as a compromise, and not as an arbitrary proportion of definite items ; but that, apart from this, as the statements had been prepared in good faith and in accordance with the uniform usage of the business, the defendant was not liable.

Judgment of ARMOUR, C.J., reversed.

## Statement.

APPEAL by the defendant from the judgment of ARMOUR, C.J., at the trial.

The following statement of the facts is taken from the judgment of MOSS, J.A. :—

The plaintiffs and defendant were co-partners, and as such carried on the business of manufacturing cotton and woollen goods under the name and style of the Paris Wincey Mills Company. The business had been carried on for several years before the 31st of January, 1896, apparently without any formal articles of agreement having been executed. It was a successful undertaking and had grown extensively, so that the original capital of each partner had greatly increased.

On the 31st of January, 1896, articles of partnership were executed defining the interests and duties of the co-partners, but, so far as appears, they introduced no material changes into the mode of conducting the business which had theretofore been pursued.

The capital stock was stated at \$75,000, the defendant's share being \$13,000. The defendant's duties, as defined, were the same as he theretofore performed, viz.

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the charge of the active work in the manufactory, the carrying on of the practical or manufacturing part, the negotiating of purchases and sales of the goods used and manufactured, and the general charge and management. For these services he received a salary of \$2,400 a year. The plaintiff A. H. Baird was the bookkeeper at a salary of \$50 a month. The other members of the partnership took no active part in its management. The profits were divisible in the same proportions as the capital.

Provision was made for dissolving the co-partnership by any partner giving not less than six months' notice in writing of intention to dissolve. There was also another provision for summarily terminating the partnership in the event of any one of the partners making default in the performance of any of the articles, covenants, or conditions of the agreement.

It was also provided that a general balance or statement of the accounts of the business and of all accounts between the partners was to be made and taken in writing on the 1st days of August and February in each year. A balance was to be struck in the months of August and February, and the profits at the latter date then accumulated were to be placed to the profit and loss account, and a final division of both the profits and capital made.

The business was continued under these articles until September, 1898, when disputes arose between the plaintiffs on one side and the defendant on the other with reference to the further conduct of the business, and each party had recourse to solicitors.

On the 26th of September, 1898, the plaintiffs' solicitor wrote the defendant's solicitor proposing that for an assignment and conveyance by the defendant to his co-partners of all his title, property, interest, claim and demand in and to all the partnership property, credits, effects, choses in action, goodwill and trade-name, and for a cancellation of the partnership articles and a release of



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the firm and its assets and the other members from all claims and demands, the plaintiffs would pay to the defendant the profits standing to his credit in the books up to the 1st of February, 1898, his salary up to the 29th of September, and 80 per cent. of the capital standing to his credit in the books. The letter contained other provisions as to possession of the property and payment of the sum offered, and proceeded to ask that if the defendant was not content with the offer he should make an offer of purchase of the plaintiffs' interest, and concluded with an intimation that if no arrangement was arrived at before the 29th of September, the plaintiffs would serve a dissolution notice on the 30th, and apply to the Court to appoint a receiver and wind up the business.

The defendant was at first unwilling to deal on the terms offered, but finally, under his solicitor's advice, accepted the plaintiffs' offer, and an instrument was prepared and executed by all parties on the 29th of September, 1898, embodying the terms of the plaintiffs' offer. The defendant assigned all his interest in the partnership property, real and personal, including his estate in the lands and premises on which the mill was situate, and released the co-partnership and its assets and the plaintiffs from all claims and demands.

The plaintiffs agreed to pay upon delivery of the instrument the amount of the profits, salary and percentage of the capital agreed upon, and to discharge the liabilities and indemnify the defendant in respect of them. And it was declared that the co-partnership was dissolved and the co-partnership articles cancelled. The plaintiffs thereupon took possession of the property and proceeded with the business, and have ever since been carrying it on.

On the 15th of October they paid to the defendant the sum of \$10,788.24, which was accepted by him as the full amount payable to him under the agreement. It appears that before the date of payment the plaintiffs had discovered errors in the stock statement, to be hereafter

referred to, but they did not complain thereof to the defendant or draw his attention to them or otherwise object to the agreement until shortly before this action was commenced, on the 30th of December, 1898.

The plaintiffs' complaint, as set forth in the statement of claim, was that they were induced to enter into the agreement of the 29th of September through the fraud of the defendant in preparing the statement of the accounts of the business up to the 1st of August, 1898, in accordance with the provision of the co-partnership articles. They alleged that in violation of his duty under the articles and as a co-partner, and with the intent of deceiving his co-partners, who he knew were contemplating the purchase of his interest, and for the purpose of making his management of the business appear profitable, and thereby inducing them to retain him or of increasing the amount he would receive if his interest was bought out by the plaintiffs, he falsely, illegally, and recklessly represented to them and entered in the firm books that the stock in trade cost more than it really cost, and he took it into stock and entered it in the books at more than he ought to have, and thereby deceived the plaintiffs and induced them to pay a greater sum than they would have paid for his interest, and that, acting upon his representations and entries, they purchased the defendant's interest and paid therefor \$10,788.24. And they claimed \$3,500 damages, or \$3,500 received by the defendant for the use of the plaintiffs.

It was shewn at the trial that the defendant took part in the preparation of the balance or statement of the accounts of the business for the period between the 1st of February and the 1st of August, 1898, and that in taking the stock certain items of goods purchased by the firm for use in the business were put in at a figure in excess of the invoice price, and it was conceded that a difference of \$1,100 might be found in that way.

It was also shewn that the uniform practice was to make the balance or statement up to the 1st of February

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in each year more formal and exact than that up to the 1st of August. Both by the usage in the business and by the provision of the co-partnership articles the statement of the 1st of February was made the basis of the division of profits and the ascertainment of the interests in capital of the co-partners. And it was always carefully overseen and audited by an independent accountant. This course had been pursued with regard to the February statement of 1898, and it was to the entries of the defendant's holding in capital and profits up to that date that the agreement of the 29th of September had reference.

It appeared that with the exception of three or four items in the stock statement of August the alleged over-charged ones had appeared in the February stock statement, and were merely repeated therefrom. It was also shewn that at the time of the preparation of the August statement neither the plaintiffs nor the defendant had in contemplation any such arrangement or agreement as was entered into on the 29th of September.

The learned Chief Justice found that in taking the stock there was no design or intention on the part of the defendant to defraud or mislead, and he held that the charges of fraud were not made out and that the claim for damages could not be upheld. But he was of opinion that the plaintiffs were entitled to have the agreement of the 29th of September set aside and the partnership declared dissolved as of that date, with the usual directions for taking the partnership accounts and winding up the partnership affairs.

He gave the plaintiffs the option of accepting this judgment or a dismissal of the action. The plaintiffs accepted the first alternative, and the defendant appealed.

The appeal was argued before OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 5th of June, 1900.

*Aylesworth*, Q.C., and *L. F. Stephens*, for the appellant. The judgment below treats the case as if there had been a

settlement of partnership accounts, which is entirely erroneous. It is quite clear that there was a purchase of the appellant's interest, and no ground whatever for setting aside the purchase has been made out. But even if the transaction is treated as if it were the taking of a partnership account the judgment is wrong. The partnership statements were prepared in the usual way; bad faith is not shewn; and the appellant is not responsible for inaccuracies, if any there be. Moreover, the *status quo* cannot be restored, and the judgment cannot be worked out. See *Millar v. Craig* (1843), 6 Beav. 433; *Pritt v. Clay* (1843), 6 Beav. 503; *Skilbeck v. Hilton* (1866), L.R. 2 Eq. 587; *Urquhart v. Macpherson* (1878), 3 App. Cas. 831.

*Robinson, Q.C.*, and *Charles Millar*, for the respondents. The right of action arises because of the appellant's negligence in preparing the statements; it is not necessary to prove fraud. That is an essential in the ordinary case of vendor and purchaser, but here the relationship of the parties imposed the duty upon the appellant of giving accurate figures, and the corresponding liability when their inaccuracy was shewn. *Hamer v. James* (1887), 4 T.L.R. 24, points the distinction. And see *Lindley on Partnership*, 6th ed., pp. 487-8. Probably it would be more accurate to frame the judgment as one for damages, leaving the contract in force.

*Aylesworth*, in reply.

June 29th, 1900. The judgment of the Court was delivered by

Moss, J. A. :—

The learned Chief Justice seems to have proceeded on the ground that the parties had dealt upon the footing of the August statement, and that errors having been shewn the agreement could not stand, and should therefore be set aside. This case was not made by the pleading, and throughout the trial the plaintiffs insisted that the agree-



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MOSS, J.A.

ment was not to be set aside, but was to stand for their benefit. But even if the case was open, and it could be deemed proper to set aside the agreement, it would not follow that the plaintiffs were entitled to a dissolution of the partnership and a winding up of its affairs as of the date of the agreement. If the agreement was not to stand, the partnership was never dissolved, and there was no case made for a summary dissolution by the Court upon the day of the agreement. The plaintiffs did not take the steps provided by the co-partnership articles for dissolving the partnership nor otherwise declare it at an end as they might possibly have done, and no case of misconduct justifying the intervention of the Court was stated or shewn in evidence. Unless the agreement terminated the partnership it was not ended at all, and the agreement being out of the way the defendant was entitled to be restored to his position as a co-partner, and to all his rights as such.

But the evidence does not support the judgment setting aside the agreement. It was not an agreement entered into on the footing of the August statement of the partnership affairs. That statement was neither mentioned nor referred to in the negotiations for the settlement of the disputes between the parties. It never was in any sense a stated or settled account between the parties. It really determined nothing. It was not made for the purposes of the sale, but in the ordinary course of the business. It was not intended, as the February statement was, to form the basis of a declaration of profits or interests in capital, and it was open to investigation and enquiry by the plaintiffs before acting upon it if they proposed to act upon it.

In truth, the whole transaction of the agreement was the plaintiffs' own proposition for an immediate settlement of the partnership affairs between them and the defendant without going into the accounts, and to avoid the necessity of taking the proceedings for winding up the business, which a dissolution in the ordinary course would involve.

They had sufficient opportunity to deliberate, and, having themselves done so, took the course of making an offer for a lump payment to the defendant for immediate possession of the partnership assets and business and the liberty to conduct it for themselves. The defendant having accepted the offer made and performed his part of the agreement in every respect, and several months having been allowed to elapse before objection made, the plaintiffs cannot be permitted to repudiate the agreement because they find that the partnership assets prove to be less than they expected. This was one of the risks which they undertook in making such a bargain. The defendant took a similar risk of the assets and profits proving more valuable or greater than was expected. If the plaintiffs had desired to make themselves secure they should have insisted upon a warranty or left the matter open to readjustment on the preparation of a proper balance sheet.

The delay and the plaintiffs' inability to restore the *status quo* are sufficient reasons for not setting aside the agreement.

The plaintiffs contended that the learned Chief Justice erred in not awarding them judgment according to their pleading. The defendant objected that by accepting the judgment the plaintiffs precluded themselves from appealing from the decision, but it is not necessary to consider this point.

The plaintiffs scarcely attacked the learned Chief Justice's finding that there was no intent to mislead or deceive, but argued that the defendant was bound not to be negligent in the preparation of the statement and that he was recklessly and carelessly negligent, and so should answer in damages. The answer to this seems to me to be that what was done in the preparation of the statement was exactly the course pursued in the preparation of all the stock statements, and was according to the uniform usage and course of the business; that, according to that usage, a standard price was for the sake of convenience and

Judgment.

Moss, J.A.

Judgment.  
Moss, J.A.

in order to avoid nice computations and additions to the invoice price, affixed to certain articles purchased for the business; that most of the articles alleged to be overvalued were of this character and their values were taken from the previous statement, and that in matters of this kind the exact value was a matter of opinion and judgment and strict exactness could not be called for or expected.

Fraud being out of the question, no action of deceit is maintainable, and upon the facts here I think the defendant has not been shewn to have violated any contractual duty or obligation from which the plaintiffs have suffered any damage.

I think the appeal ought to be allowed and the plaintiffs' action dismissed with costs.

*Appeal allowed.*

R. S. C.

## WINTEMUTE V. BROTHERHOOD OF RAILROAD TRAINMEN.

*Insurance—Life Insurance—Benevolent Society—Beneficiary Certificate—Forfeiture—Non-Payment of Dues—Rules—Conditions—60 Vict. ch. 36, sec. 144 (O.).*

The defendants were an unincorporated union or society of workmen of a particular class, having their head office in a foreign country, with unincorporated branches or lodges in this Province:—

*Held*, that beneficiary certificates issued by them to members, entitling members or their representatives, upon payment of certain assessments, and compliance with certain conditions, to certain pecuniary benefits, were not subject to the provisions of section 144 of the Ontario Insurance Act, 60 Vict. ch. 36.

*Held*, also, that even if the Act did apply, a beneficiary certificate not containing an absolute contract to pay any sum but stating merely that upon compliance with the conditions, and upon payment of the assessments, directed by the constitution, the sum authorized by the constitution would be paid, and that any default would render the certificate void, was not within the section, and that the conditions of the constitution must be read into it in determining its validity.

Judgment of ARMOUR, C.J., reversed.

Statement.

An appeal by the defendants from the judgment of ARMOUR, C.J., was argued before MACLENNAN, MOSS, and LISTER, J.J.A., on the 16th of January, 1900. The facts and arguments are stated in the judgments.

*A. H. Clarke*, for the appellants.

*F. D. Davis*, for the respondent.

Judgment.

MACLENNAN,  
J.A.

June 29th, 1900. MACLENNAN, J.A.:—

Action upon a beneficiary certificate upon death of plaintiff's husband. Defence, non-payment of dues for several months before the death. Judgment for the plaintiff on the ground that the condition or stipulation terminating the certificate was not set out on the face or back of the contract as required by 55 Vict. ch. 39, sec. 33 (O.), and 60 Vict. ch. 36, sec. 144 (O.)

I have come to the conclusion that the appeal ought to be allowed, and that the action should be dismissed.

The certificate declares that Brother Freeman Wintemute is entitled to all the benefits of membership and to participate in the beneficiary department, Class C., of the Brotherhood, to the amount set forth in the constitution thereof, which amount at his death shall be paid to Eva Wintemute, his wife, if living. It then goes on to say that the certificate is issued on the express conditions that the brother shall comply with the constitution, and all the by-laws, rules, and regulations then in force, or afterwards adopted, which, as printed and published by the Grand Lodge, are made a part of the contract, and that he pay all dues and assessments imposed upon him, within the time specified by the constitution and by-laws, and that any failure to make such payment of any grand or subordinate lodge dues, or any general or special assessment levied, shall at once forfeit any and all rights under it, and the certificate shall become void, without notice to the assured.

Now in order to ascertain the full meaning and effect of this contract, we must go outside of the certificate. We must ascertain what is meant by the beneficiary department, Class C., and we must enquire what is the constitution and what are the by-laws, rules, and regulations of the society which have to be observed; and what are the



Judgment.MACLENNAN,  
J.A.

dues and assessments which the beneficiary is to pay, and failure to pay which is to put an end to the contract. Unless we can thus look outside of the certificate, there is not enough within its four corners to give the plaintiff a cause of action, and her action must have failed.

When the constitution, by-laws, rules, and regulations are looked at, we find that the member's right as a beneficiary in Class C. was to the sum of \$1200, and that there was a Grand Lodge assessment of 25c. per month for the first and second months of each quarter, and also a beneficiary assessment, in respect of the certificate, of \$2 per month, such assessments being payable before the first day of each month.

The certificate is dated the 9th of November, 1895, and was accepted by the deceased on the 20th of the same month; and he died on the 3rd of December, 1897. Receipts for all assessments down to March, 1897, were produced; and a receipt for April was accounted for; and it was admitted that the dues for the following months, down to the death, had not been paid.

Now upon that contract, and having regard to the failure to pay the assessments, there can plainly be no recovery, apart from the statute relied upon by the learned Chief Justice; for, by its very terms, any failure to make payment of either grand or subordinate lodge dues, within the time specified, forfeited all rights thereunder, and the certificate became void without notice to the assured.

It was made a question whether the section of the statute, 55 Vict. ch. 39, sec. 33 (1) (O.) applied to the case. But, assuming it to apply, what is its effect? What it enacts is this: "Where any insurance contract made by any corporation whatsoever within the intent of section 2 of this Act is evidenced by a sealed or written instrument, all the terms and conditions of the contract shall be set out by the corporation in full on the face or back of the instrument forming or evidencing the contract; and unless so set out, no term of, or condition, stipulation, warranty,

or proviso, modifying or impairing the effect of any such contract, . . . shall be good or valid, or admissible in evidence to the prejudice of the assured or beneficiary." Now if the Act means that the certificate alone is the whole contract, because by the first clause *all the terms and conditions* are to be set out on the face or back of the instrument, then there is no sufficient contract of insurance at all, for there is nothing to shew what sum was agreed to be paid. Evidently what the Legislature means is this: If there is an instrument, or perhaps more than one instrument referring one to the other, constituting a sufficient contract of insurance, then the effect of that contract is not to be modified or impaired by any term, condition, stipulation, warranty or proviso, not set out in full on the face or back of the instrument. It is not necessary to determine what the effect would have been, if we had to refer to the constitution merely to ascertain the amount of the insurance and the monthly assessments, and if the certificate had been silent as to the effect of non-payment, for the certificate itself contains the fatal condition, namely, that upon failure to pay within the time specified the contract was to come to an end.

It was contended that the certificate was saved by section 165 of 60 Vict. ch. 36 (O); but the default here was in the payment of assessments payable at fixed dates, and the case is therefore not within that section.

I am of opinion that the appeal should be allowed, and that the action should be dismissed.

Moss, J.A. :—

Although the beneficiary certificate upon which the action is founded was issued upon the 9th of November, 1895, it was agreed upon the argument that the Act 60 Vict. ch. 36 (O.) embodies the law applicable to the certificate, and reference may be conveniently made to it rather than to the several Acts of which it is a consolidation.

Judgment.

MACLENNAN,  
J.A.

Judgment.

MOSS, J.A.

The learned Chief Justice was of opinion that section 144 applied to these defendants, and that the certificate, which is the instrument forming or evidencing the contract, did not set out all the terms of the contract, and that, therefore, the defendants were apparently not in a position to insist upon the undisputed fact that from the 30th of April, 1897, until the 3rd of December in the same year, when Freeman Wintemute was killed, he had failed to pay the monthly dues in respect of the certificate. These were \$2 per month payable in advance before the first day of each month.

The position of the defendants seems to be peculiar, and it is difficult to say that they come within the terms of section 144.

The beneficiary certificate is issued by the Grand Lodge of the Brotherhood, which is located at Galesburg, in the State of Illinois.

Subordinate lodges are created by charter granted by the Grand Lodge, and Freeman Wintemute was a member of Circle Lodge, No. 227, located in Sarnia, in this Province. The objects of the Brotherhood, as stated in the preamble to the constitution, are such as to bring them within the category of a friendly society, but the defendants are not incorporated or registered as such under the sections of the former Insurance Acts, corresponding to sections 30 to 37 inclusive of 60 Viet. ch. 36 (O.) and section 60 of the same Act. Neither has any branch or lodge situate in Ontario been incorporated or registered.

It is not a corporation or a registered friendly society within the intent of section 2 of the Act, and its insurance contract, though evidenced by a sealed instrument, does not fall within the provisions of section 144. That section, though general and including all insurance contracts, whether undertaken by a corporation registered in the Insurance License Register or by a corporation registered as a friendly society (see Hunter's Insurance Corporation Acts, p. 229), stops short of an organization like the defendants.

Judgment.

MOSS, J.A.

It was probably for the reason that the defendants did not appear to fall within any of the definitions of "Corporation" or "Friendly Society" embraced in sub-sections 8, 11, 12, 13, 14, 15, and 29, of section 2 of the Act, that the Registrar of Friendly Societies granted to them a certificate declaring that they were exempted from the operation of the Insurance Incorporation Act of 1892, under the provisions thereof corresponding to sub-section 3 of section 60 (proviso) of 60 Vict. ch. 36 (O.)

It was argued that whatever may be the status of the defendants they are more than a *bonâ fide* trade union or labour organization, and, therefore, they are not entitled to a certificate under the proviso, because if, in addition to the *bonâ fide* purposes of a trade union or labour organization, they choose to undertake or effect contracts of insurance they are bound by all the provisions of the law applicable to such contracts, including those contained in section 144.

But, as already pointed out, section 144 does not cover the defendants as a corporation or a registered friendly society. And therefore even if the certificate of the Registrar of Friendly Societies was improperly granted that would not advance the plaintiff's case, for the defendants' contract would still remain unaffected by the provisions with regard to setting out terms and conditions.

The remaining point raised by the plaintiff's counsel was that Wintemute was not notified of his default as required by section 165, and that, therefore, there was no forfeiture or suspension of his rights, or those of the plaintiff under the certificate. Assuming, for the sake of the argument, that the section applies to the case, the contributions or assessments in respect of which there was default were payable at fixed dates and the provisions as to notice do not apply. The case in this respect is not at all similar to the case of *Re Select Knights of Canada* (1898), 29 O.R. 708.



Judgment.  
MOSS, J.A.

I think the appeal should be allowed and the action dismissed.

LISTER, J.A.:—

I agree.

*Appeal allowed.*

R. S. C.

### BOGARDUS V. WELLINGTON.

*Statute of Limitations—Sale of Goods—Warranty—Fraud.*

The defendant, who was a nurseryman, sold to the plaintiff a number of peach trees, stating in the sale agreement that they were “No. 1 peaches, warranted true to name”:—

*Held*, that this was merely a warranty that the trees were of the varieties contracted for; that the trees not being of the varieties contracted for, the warranty was broken at the time of the delivery; and that in the absence of fraud an action for damages for its breach brought more than six years after the delivery was barred, although, until the trees came into bearing between three and four years before the action, it was impossible to tell that they were not of the varieties contracted for.

Judgment of ROBERTSON, J., reversed.

Statement.

APPEAL by the defendant from the judgment at the trial.

The defendant was a nurseryman, and in the action, which was begun on the 20th of January, 1898, the plaintiff claimed damages for breach of warranty of quality of certain trees supplied to him. These trees were sold and delivered to the plaintiff in the year 1890, the defendant agreeing in writing to supply “No. 1 peaches warranted true to name; 350 Early Crawfords, etc.” In the statement of claim the allegation was that the defendant sold to the plaintiff peach trees and warranted them to be No. 1 trees and true to name, while they were in fact of inferior quality and not true to name. The defendant among other defences set up the Statute of Limitations.

Statement.

The action was tried before ROBERTSON, J., and a jury, and the plaintiff, by leave, pleaded in reply that the defendant fraudulently misrepresented the quality of the trees, and that the plaintiff could not have discovered the representations to be untrue until shortly before the commencement of the action. The jury found that the trees were not true to name; that the plaintiff could have discovered this first only in 1894 when the trees came into bearing; that the defendant represented at the time of the sale that the trees were true to name; that there was fraud on the part of the defendant "in the trees not being as represented;" and that the plaintiff was entitled to \$450 damages.

Judgment was given on these findings in the plaintiff's favour but on appeal to a Divisional Court the finding as to fraud and the assessment of damages were set aside, and the action was sent back for further trial before a judge without a jury upon these points.

The trial was continued before ROBERTSON, J., who subsequently gave judgment in the plaintiff's favour for \$450. The learned Judge did not determine the question of fraud but held that the plaintiff's cause of action did not accrue until he discovered that the trees did not bear fruit true to name.

The appeal was argued before MACLENNAN, MOSS, and LISTER, JJ.A., on the 14th and 15th of March, 1900.

*Ritchie*, Q.C., and *E. B. Ryckman*, for the appellant.

*Lynch-Staunton*, Q.C., and *J. H. Ingersoll*, for the respondent.

September 22nd, 1900. MACLENNAN, J.A. :—

The question is whether the warranty can be read as meaning that when the trees should come into bearing, the peaches should turn out to be true to name. The words are "peaches warranted true to name," and if we could see that the word "peaches" as there used really meant the

Judgment.MACLENNAN,  
J.A.

fruit, the plaintiff's cause of action might have arisen only when the fruit appeared, and was found not to be true to name. It is impossible however to hold the word "peaches" to mean anything but the trees. It was trees and trees only for which the parties were bargaining, and the word "peaches" in the warranty means peach trees, that is 350 early Crawford peach trees, etc. The judgment must therefore be for the defendant on the Statute of Limitations, the action having been brought more than six years after the trees were delivered.

The only other question was whether there was any evidence of fraud on the part of the defendant. I do not think there was.

The appeal must therefore be allowed and the action dismissed.

Moss, J.A.:—

I am unable to agree with the learned trial Judge in his construction of the contract. I think the warranty given was that the trees delivered would be true to name, i.e., that if they bore fruit it would be of the kind the name of the trees indicated. This is not the same thing as warranting that they would bear fruit and that the fruit would be true to name. There is nothing in the warranty about the bearing of fruit. The trees delivered are warranted true to name. It follows that the breach occurred when trees were delivered which were not true to name, and the statute began to run from that time. And if that be so the circumstance that the plaintiff was not then able to discover the fact forms no answer either on legal or equitable grounds to the plea of the Statutes of Limitations unless at all events the acts in respect of which the suit is maintained were furtive and fraudulent: *Gibbs v. Guild* (1882), 9 Q.B.D. 59; *Bulli Coal Mining Co. v. Osborne*, [1899] A.C. 351; or the plaintiff was prevented by the fraud of the defendant from discovering that a cause of action had accrued: *Armstrong v. Milburn*

(1886), 54 L.T. 247, 723; *Re Astley etc. Coal Co. and Tyldesley Coal Co.* (1899), 80 L.T. 116. And this the plaintiff has neither alleged nor proved.

Judgment.

MOSS, J.A.

The ground of action is the contract to deliver trees true to name and both the contract and the breach of it admit of a definite assignment of date. When might the action have been instituted is the question, for from that time the statute must run. As soon as the defendant delivered trees not true to name he might have been sued and the statute began to run although the plaintiff was unaware of the breach and had as yet suffered no damage: *Short v. McCarthy* (1820), 3 B. & Ald. 626; *Granger v. George* (1826), 5 B. & C. 149; *Howell v. Young* (1826), 5 B. & C. 259. Although the learned trial Judge did not proceed upon fraud he indicated his view as being against the defendant. I am unable to agree that upon the evidence any case of fraud has been established. The onus was upon the plaintiff to shew fraud as alleged. But there is an entire failure to shew that there was fraud or deceit in or about the making of the contract; there was no evidence of fraudulent concealment from the plaintiff or of any attempt to conceal anything from him that he should know. The jury were only able to say that there was fraud in the trees not being as represented, and this finding was rightly set aside by the Divisional Court. The representation was in the contract and the failure to deliver according to it was a breach of the contract but not a fraudulent act.

I am of opinion that the appeal should be allowed and the plaintiff's action dismissed with costs.

LISTER, J.A. :—

I agree that this appeal should be allowed. The evidence clearly establishes the warranty and its breach, and also that the plaintiff was without fault ignorant of such breach and his consequent cause of action until the



Judgment.

LISTER, J.A.

year 1894, when he first discovered that some of the trees were not as warranted, but so far as I have been able to discover, it fails to show any deception, imposition, or fraud, which induced the plaintiff to enter into the contract or kept him in ignorance of his cause of action: in short the evidence apart from that which relates to the damages claimed establishes merely a breach of contract without fraud or fraudulent concealment. It is clear upon the authorities that the plaintiff's cause of action accrued when the defendant, in 1890, broke his contract by delivering to the plaintiff varieties of trees different from those which he had contracted to deliver, and upon the facts here it is equally clear that the statute then began to run, although, as I think, the plaintiff was and continued to be ignorant of the breach until 1894.

In the second edition of Darby and Bosanquet's work on Limitations, at p. 36, the rule with respect to the time when the statute begins to run is concisely stated in these words: "In all actions on promises, as we have seen, the statute runs not from the making of the promise, but from the breach, the breach being the cause of action, or the gist of the action, as it has been called. Consequential damage arising from the breach gives no new cause of action; it is admissible in evidence on the question of damages, but in an action for breach of contract, even if no consequential damages are proved at all, the plaintiff would still be entitled to a verdict. . . . And this principle holds good, even if the plaintiffs are ignorant of the breach, till after the expiration of the statutory period." And see *Battley v. Faulkner* (1820), 3 B. & Ald. 288; *Short v. McCarthy* (1820), 3 B. & Ald. 626; *Brown v. Howard* (1820), 2 Brod. & B. 73; *Whitehead v. Howard* (1820), 2 Brod. & B. 372; *Howell v. Young* (1826), 5 B. & C. 259; *East India Co. v. Paul* (1849), 7 Moo. P.C. at p. 111; *Violett v. Sympton* (1857), 8 E. & B. 344; *Hughes v. Twisden* (1886), 55 L.J.Ch. 481; *Smith v. Fox* (1848), 6 Ha. 386; *Gibbs v. Guild* (1882), 9 Q.B.D. 59.

Where, however, there is proof that the discovery of a cause of action has been prevented by the fraud of the defendant the statute does not attach until such time as the plaintiff acquires knowledge, or could by reasonable diligence have acquired knowledge, that his cause of action had accrued; but that is not the case which the plaintiff makes. Reference may be made to the cases of *Bulli Coal Mining Co. v. Osborne*, [1899] A.C. 351, and *Re Astley etc., Coal Co. and Tyldesley Coal Co.* (1899), 80 L.T. 116, as being the latest cases in which the doctrine of fraud and fraudulent concealment as it affects the operation of the statute has been considered and applied. I agree that the warranty relates to the trees and not to the fruit which they might bear: that such was the interpretation put upon it by the plaintiff seems to be evident from as well the correspondence between the parties as the pleadings in the action.

In my opinion the plaintiff's right to recover the claim for which he sues is barred by the statute.

Judgment.

LISTER, J.A.

*Appeal allowed.*

R. S. C.

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## IN RE ALLEN AND NASMITH.

*Landlord and Tenant—Lease—Covenant—Renewal—Rent.*

A lease of land, upon which there were no buildings except an old shed, contained a covenant by the lessor to grant at the expiration of the term, if requested, "another lease" to the lessee "for the further term of twenty-one years," at such rent as might be agreed on or fixed by arbitration, "such renewed lease to contain a like covenant for renewal":—

*Held*, that the rent for the renewal term should be based upon the value of the land at the time of the renewal, and not upon the value of the land and of buildings erected by the lessee during the term.

*Van Brocklin v. Brantford* (1861), 20 U.C.R. 347; affirmed in appeal, 26th June, 1862, followed.

Judgment of *BOYD, C.*, 31 O.R. 335, affirmed.

## Statement.

AN APPEAL by Allen from the judgment of *BOYD, C.*, reported 31 O.R. 335, was argued before *ARMOUR, C.J.O.*, *MACLENNAN*, *MOSS*, and *LISTER, JJ.A.*, on the 13th of September, 1900. The facts are stated in the report below.

*Aylesworth, Q.C.*, for the appellant.

*A. J. Russell-Snow*, for the respondent.

October 10th, 1900. *ARMOUR, C.J.O.* :—

I do not think that the covenants contained in the lease, other than the covenant for renewal, afford any aid to us in arriving at a proper conclusion upon the question submitted to us.

Nor do I think that we ought to hold that this question, arising as it does upon the lease itself, is in any way affected by the terms of the submission, it being clear that the parties to it never intended that the terms of the lease should be thereby altered or varied.

The question therefore is reduced to this, whether the arbitrators drew the proper inference from the terms of the lease as to the basis upon which they should fix the rent payable under the renewal lease.

The decision at which they arrived is not without authority to support it.

Judgment.

ARMOUR, C.J.O.

In *Van Brocklin v. Brantford* (1861), 20 U.C.R. 347, the covenant for renewal was the following, as set out in the report: "And the defendants covenanted with the lessee, his executors, etc., that they would, if thereto requested in writing by him, his executors, administrators, or assigns, six months before the expiration of the term, grant a further lease of the premises to him, his executors, administrators and assigns, for the term of ten years, to commence at the end of the former term, at such yearly rent as should be fixed by two arbitrators, one to be chosen by each party, etc., such renewal lease to contain like covenants to those in the first lease, except the covenant to renew."

In delivering the judgment of the Court, Robinson, C.J., said: "We think we must consider, that if the defendants had found themselves in a situation to grant a renewal lease, as they had undertaken to do, the rent to be fixed by arbitration for the ten years to come *would* (by which I mean that it *should*) have been rent estimated upon the ground rent that could be justly charged during that period, not taking into account the buildings. I take that to be the usual course in all such cases, when there is nothing in the terms of the original lease more special than there was in this. To take the value of the buildings into consideration in fixing the renewal rent would be making the tenant pay interest at once upon an expenditure made by himself."

An appeal was had in this case to the Court of Error and Appeal.

The appeal book is to be found at p. 174 of vol. 4 of the "Printed Cases in the Court of Error and Appeal," and therein is set forth at length the lease; the charge of the learned Judge who tried the cause, who stated to the jury "that the rent to be fixed by valuation for the new term was a matter of some doubt, and that he hardly thought the intention was to estimate anything beyond mere ground rent value, but that the lease does not in terms so restrict



Judgment.  
ARMOUR, C.J.O.

it, and he could not tell the jury so to restrict it;" and the grounds of appeal, one of which was, "that at all events, under the lease, and by operation of law, the buildings erected on the demised premises became part of the freehold, and at the expiration of the term granted by the lease became the property of the defendants, and that on any renewal that might have been granted under the provisions of said covenant, the rent to be fixed by arbitration and reserved for the new term, would in law have been in respect of the buildings as well as the land."

It appears by the Minute Book of the Court of Error and Appeal, vol. 1, that the appeal was argued on the 26th of December, 1861, and on the 26th of June, 1862, the following entry appears therein:—

<i>Van Brocklin</i>	} "In both these cases Draper, C.J., stated
v.	
<i>Brantford, and</i>	
<i>Wilson</i>	
v.	
<i>Thomas.</i>	that, in the view of their lordships, they were
	not appealable, but would, however, affirm
	judgments of Court below. Appeals dis-
	missed with costs."

From this entry I conclude that the Court of Error and Appeal, although being of the opinion that the judgment of the court below was not appealable, did, nevertheless, affirm the said judgment.

The principle of the decision in that case is decisive of the present case, and, following the decision in that case as we are bound to do, we must dismiss this appeal with costs.

MOSS, J.A. :—

The decision in *Van Brocklin v. Brantford* (1861), 20 U.C.R. 347, is decisive of this appeal, if, as appears to be the case, it was affirmed by the Court of Error and Appeal.

The Registrar's note of the disposition by that Court of the defendants' appeal is not entirely satisfactory. It leaves to conjecture whether the Court formed an opinion

on the merits of the case, or only dealt with the objection that it was not an appealable case. The statement that the Court would, however, affirm the judgment seems to indicate that the merits were considered. Otherwise, the usual course would have been to have pronounced no order.

As the case stands, I think we should accept the decision as conclusive against the present appellant's contention.

MACLENNAN, and LISTER, JJ. A., concurred.

*Appeal dismissed.*

R.S.C.

Judgment.

MOSES, J.A.

## EARLE V. BURLAND.

*Company—Reserve Fund—Dissentient Minority—President—Purchase for Company—Secret Profit—Directors—Salaries.*

An ordinary trading company can, without special authority, set apart a reserve fund, but the majority of the shareholders cannot, against the wishes of the minority, accumulate out of the profits a reserve fund which is far larger than is required to provide for all liabilities of, and vicissitudes in, the business; and where such a fund had been accumulated and portions of it had from time to time been invested, by the directors elected by the majority, in unauthorized and hazardous investments, the Court, at the instance of the minority, ordered a reasonable proportion to be set aside as a reserve fund and the balance to be distributed among the shareholders as undrawn profits.

Judgment of ARMOUR, C.J., varied.

The president of a company cannot, unless with the consent of all the shareholders, make a profit by selling to the company a property which he knows the company requires and which he buys, with that knowledge, for the express purpose of selling to it.

Judgment of ARMOUR, C.J., affirmed.

The president and vice-president of a company drew for several years, without proper authority but with the acquiescence of their co-directors, elected by, and closely connected with, the majority of the shareholders, large sums, ostensibly as salaries as general manager and managing director respectively:—

*Held*, that the propriety of the payments could be inquired into at the instance of dissatisfied shareholders, although the majority were prepared to ratify them.

Judgment of ARMOUR, C.J., reversed.

Statement.

APPEAL by the defendants, and cross-appeal by the plaintiffs, from the judgment at the trial.

The plaintiffs were shareholders in the British American Bank Note Company and brought the action against the directors and other shareholders in the company, asking for declarations as to certain questions arising in connection with its business.

The following statement of the facts as to the main issue in the action is taken from the judgment of Moss, J.A. The facts as to some minor issues are stated in the judgments.

The British American Bank Note Company was incorporated on the 16th of June, 1866, with a nominal capital stock of \$100,000, divided into 1000 shares

of \$100 each, for the purpose of carrying on the manufacturing, mechanical, and chemical, operations and business required in the engraving and printing of bank notes, debentures, bonds, postage and bill stamps, and bills of exchange, and all other branches incidental thereto. All the shares were subscribed for by and distributed amongst nine persons, of whom the plaintiffs Henry Earle and Jane Taylor Gillelan, and the defendant G. B. Burland, were three. Of the original shareholders these three are the only ones who still hold shares in the company. In 1882 the capital stock was increased to \$200,000, and of the additional 1000 shares thus created 700 have been taken up and paid for. The other 300 shares remain unissued.

Of the 1700 shares issued, the defendant G. B. Burland is the registered holder of 1077, the defendant Jeffrey Burland, his son, is the holder of 80, the defendant G. Hope Burland, his nephew, is the holder of 20, Robert Burland, another nephew, is the holder of 50, Mrs. H. M. Ann, his daughter, is the holder of 10, H. M. Ann, her husband, is the holder of 10, and the defendant George E. Valleau, a relation or connection, is the holder of 20. The plaintiffs are the holders of the remaining 433 shares.

The defendant G. B. Burland is president and general manager, the defendant Jeffrey Burland is vice-president and managing director, the defendant G. Hope Burland is a director and an employee of the company, the defendant Valleau is secretary-treasurer and bookkeeper, and Robert Burland is superintendent of the works. The defendants G. B. Burland, Jeffrey Burland, Geo. E. Valleau, and G. Hope Burland, constitute the board of directors. Each of these gentlemen is in receipt of a salary from the company, and some of the salaries form the subject of a cross-appeal.

On the 18th of August, 1866, the shareholders adopted a number of by-laws and amongst others one (No. 13) which provided that the directors might set apart any



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portion of the profits for a reserve fund, subject to the approval of a general meeting, or to the appropriation of such fund by such meeting to any other purpose.

This resolution was not in form acted upon by the directors. No account was opened under the head of reserve fund, nor was any specific sum ever set apart out of the profits or net earnings of any year, but it was the usage of the directors to leave a considerable portion of the profits or net earnings undistributed and to carry it over from year to year as a balance at credit of profit and loss account.

In the year 1872 the yearly balance sheet shewed the amount thus accumulated to be \$59,875.32, chiefly in deposits in various banks. On the 18th of November of that year the directors resolved that, whereas the company had from time to time sums of money lying to its credit at the banks at a rate of interest not exceeding five per cent. per annum and it was expedient to make temporary loans of such sums at higher rates of interest on adequate security as the market may offer, the manager be authorized to make such loans in his own name but acting as the agent of the company and with the consent of the president or secretary-treasurer and to receive and effect transfers of stock, a memorandum of all securities taken to be handed in to the company and entered in its books. The terms of this resolution shew that the directors were contemplating the moneys mentioned in it being employed in dealings in shares of other corporations. In fact the next resolution passed at the same meeting shews that some of them were already embarked in loans on bank shares, for it was resolved "that the transaction made by the manager on the 11th of October last, loaning \$5000 for 6 months at  $9\frac{1}{2}$  per cent. per annum on the security of 11 shares of Bank of Montreal stock; and the transaction made by him on the 5th inst., loaning \$4750 at 9 per cent. per annum on the security of 80 shares of stock of the Bank of Commerce, be approved and entered in the books of the company."

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It does not appear that either of these resolutions was submitted to and received the approval of a general meeting but from their date onwards Mr. G. B. Burland, who was then the manager and subsequently became the president, continued to make loans of the accumulated surplus funds of the company upon the security of shares of banks and other corporations and mortgages of real estate. The interest and income derived from these investments was carried into the company's accounts and formed an item in the yearly balance sheet and in several of the annual reports presented to the shareholders' meetings, to which references are made in some of the stages of the examination of Mr. G. B. Burland for discovery, an explanation of the amount to be found at the credit of profit and loss is tendered. For example the report presented to the general annual meeting on the 5th of September, 1876, contains the statement that in view of the depreciation in business the directors deem it necessary to reserve sufficient out of the profits to pay next year's expenses and have therefore declared a dividend of 15 per cent. leaving \$44,022.32 to the credit of profit and loss account. Again at the annual meeting of the 2nd of September, 1879, the balance sheet was presented shewing a balance of \$48,949.92 at credit of profit and loss account after the payment of dividends of 30 per cent. The directors' report refers to investments in the following language: "Owing to the shrinkage in the value of real estate and the continuance of business depression in the country, the investments of the company have been considerably impaired, and to meet this your directors have written off such amounts to cover the same as have been deemed sufficient for this purpose as can be seen by reference to the accounts now presented to this meeting." Among other items which appear written off was a sum of \$5531.25 for loss on shares of the Consolidated Bank in which a part of the surplus funds had been invested by Mr. Burland. From these entries and others it would

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appear that while in form the directors had not set apart a reserve fund it was known to the shareholders that a portion of the net earnings or profits of the company was annually retained, and instead of being distributed in dividends was being invested in bank and other shares and in mortgages of real estate.

In the balance sheet of 1879 a list of investments is shewn and this practice is continued in each annual balance sheet thereafter. From this list it appears that the investments were chiefly in shares of banks and other corporations. In 1888 a sum of \$5400 is written off for loss in consequence of depreciation of Federal Bank stock and in the same year there is a loss of \$10,000 amount paid and double liability incurred in respect of Central Bank stock. But despite these and other deductions for depreciations and loss the amount at the credit of profit and loss account gradually increased year by year, and every year the directors retained or reserved a portion of the annual net earnings or profits and carried it to the credit of the profit and loss account. And so successful were the company's operations and so great the profits derived therefrom that the annual statement of profit and loss account for the year 1897, presented to the shareholders at the annual meeting on the 1st of February, 1898, shewed a sum of \$264,167.21 at the credit of the account, after payment of \$17,000 in dividends and providing for all debts and contingencies, and this notwithstanding the fact that during every year large distributions of the profits or earnings were made in the shape of dividends and bonuses.

An examination of the balance sheets further shews that during this period the plant and material and real estate of the company from time to time received considerable additions. In 1880, plant and material were valued at \$38,013.37; in 1896, they were valued at \$84,144.00; in 1880, real estate stood at \$14,000.00; in 1896, it stood at \$37,500.00. In 1897 the value of these items is reduced, because, as explained by Mr. G. B. Bur-

land, in consequence of the company failing to obtain a renewal of its contract with the Dominion Government a considerable portion is not now in operation and is therefore treated as representing no market value.

Of the sum of \$264,167.21 Mr. Burland says it represents actual cash or securities in hand in mortgages or bank stock worth dollar for dollar and convertible into money in three months. Since the loss of the Government contract the company has paid a dividend of 10 per cent. on the capital stock without having recourse to the surplus and expects to continue doing so. So that at present there is this large sum of money capable of being withdrawn from the assets of the company and if so withdrawn leaving the capital, the plant and material, and the real estate, unimpaired.

The action was tried before ARMOUR, C.J., who, on the 23rd of May, 1899, gave the following judgment:—

ARMOUR, C.J.:—

The defendant company was incorporated by Letters Patent dated the 16th of June, 1866, granted under the provisions of 27 & 28 Vict. ch. 23, entitled “An Act to authorize the granting of charters to manufacturing, mining and other companies,” with power to the company to engrave and print bank notes, debentures, bonds, postage and bill stamps, and bills of exchange, and to carry on all other branches incidental thereto.

And by the Letters Patent the company was declared to be subject to the general provisions of the law set forth in the Act, which were therein recited, and were as contained in sections five to thirty-four of the Act, both inclusive.

The powers of a company so incorporated have been held by the highest authority to be those and those only conferred upon it by the statute, under the provisions of which it is incorporated, and whatever may fairly be regarded as incidental to or consequential upon such powers.



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The principal case on the subject is *Ashbury Railway Carriage and Iron Co. v. Riche* (1875), L. R. 7 H. L. 653. Lord Selborne in that case said: "I only repeat what Lord Cranworth, in *Eastern Counties R.W. Co. v. Hawkes* (1855), 5 H. L. C. 331, when moving the judgment of this House, stated to be settled law, when I say that a statutory corporation, created by Act of Parliament for a particular purpose, is limited, as to all its powers, by the purposes of its incorporation as defined in that Act."

In *Attorney-General v. Great Eastern R. W. Co.* (1879), 11 Ch. D. 449, at p. 486, Bagallay, L. J., said: "It must now be accepted as settled law, that corporations created by statute, whether by special Acts of Parliament, as in the case of railway, gas, and water companies, or by memoranda of association deriving their force from the provisions of the Joint Stock Companies Acts, have not the same powers, privileges, and general incidents as are the attributes of common law corporations, but such powers, privileges, and incidents only as are conferred upon them by their special Acts or memoranda of association."

In the same case in the House of Lords, (1880) 5 App. Cas. 473, Lord Chancellor Selborne said: "I assume that your Lordships will not now recede from anything that was determined in *Ashbury Railway Carriage and Iron Co. v. Riche*. It appears to me to be important that the doctrine of *ultra vires*, as it was explained in that case, should be maintained. But I agree with Lord Justice James that this doctrine ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the Legislature has authorized, ought not (unless expressly prohibited) to be held, by judicial construction, to be *ultra vires*."

Lord Blackburn said: "I take it that, as far as the main point to be considered is concerned, this House has no more right than any other tribunal to depart from the principle of the decisions which have been already arrived

at; more particularly I allude to the last case of *Ashbury Railway Carriage and Iron Co. v. Riche*. That case appears to me to decide at all events this, that where there is an Act of Parliament creating a corporation for a particular purpose, and giving it powers for that particular purpose, what it does not expressly or impliedly authorize is to be taken to be prohibited. . . . I quite agree with what Lord Justice James has said on this first point as to prohibition, that those things which are incident to, and may reasonably and properly be done under the main purpose, though they may not be literally within it, would not be prohibited."

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Lord Watson said: "I cannot doubt that the principle by which this House, in the case of *Ashbury Railway Carriage and Iron Co. v. Riche*, tested the power of a joint stock company registered (with limited liability) under the Companies Act of 1862, applies with equal force to the case of a railway company incorporated by Act of Parliament. That principle, in its application to the present case, appears to me to be this, that when a railway company has been created for public purposes, the Legislature must be held to have prohibited every act of the company which its incorporating statutes do not warrant either expressly or by fair implication."

In *Baroness Wenlock v. River Dee Company* (1885), 10 App. Cas. 354, Lord Blackburn said: "It is not necessary to decide anything as to the effect of *Ashbury Railway Carriage and Iron Co. v. Riche*. The course the argument took makes me think it proper to say,—though it is quite true, as Mr. Rigby said, that it was not necessary for the decision in *Ashbury Railway Carriage and Iron Co. v. Riche* to do more than decide what the law was with regard to a company formed under the Companies Act of 1862—that I think the law there laid down applies to all companies created by any statute for a particular purpose. I think that if I were to confine the effect of the decision to companies created under the Act of 1862, and

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to say it did not extend to such a corporation as this, I should do wrong. The law is proverbially uncertain. That cannot be helped. But I think I should unjustifiably add to the uncertainty if I set an example of adhering to my previous reasoning (even should I still think it better than that of noble and learned Lords who decided against it) in every case not precisely involving the very same point. I think *Ashbury Railway Carriage and Iron Co. v. Riche* is a binding authority to the extent indicated in *Attorney-General v. Great Eastern R. W. Co.*"

See also the judgment of Bowen, L. J., in the same case, (1883) 36 Ch. D. 675(n), at p. 685.

It is quite clear also that if anything is done by a company incorporated as the defendant company was, which is *ultra vires* of its powers, it cannot be ratified by any action of the shareholders.

In *Ashbury Railway Carriage and Iron Co. v. Riche*, Lord Chancellor Cairns said (p. 672): "The question is not as to the legality of the contract; the question is as to the competency and power of the company to make the contract. Now, I am clearly of opinion that this contract was entirely, as I have said, beyond the objects in the memorandum of association. If so, it was thereby placed beyond the powers of the company to make the contract. If so, my Lords, it is not a question whether the contract ever was ratified or was not ratified. If it was a contract void at its beginning, it was void because the company could not make the contract. If every shareholder of the company had been in the room, and every shareholder of the company had said, 'That is a contract which we desire to make, which we authorize the directors to make, to which we sanction the placing the seal of the company,' the case would not have stood in any different position from that in which it stands now. The shareholders would thereby, by unanimous consent, have been attempting to do the very thing which, by the Act of Parliament, they were prohibited from doing."

A good deal was said in the argument as to a reserve fund, and as to the power of the company to establish a reserve fund.

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There was certainly no express power given to the defendant company to establish a reserve fund.

And it was argued that because in the Companies Clauses Consolidation Act, 1845, 8 & 9 Vict. ch. 16, sec. 122 (Imp.), it was provided that "before apportioning the profits to be divided among the shareholders, the directors may, if they think fit, set aside thereout such sum as they may think proper to meet contingencies, or for enlarging, repairing, or improving, the works connected with the undertaking, or any part thereof, and may divide the balance only among the shareholders," and because in the Companies' Act, 1862, 25 & 26 Vict., ch. 89 (Imp.), Table A. 74, it is provided that "the directors may, before recommending any dividend, set aside out of the profits of the company such sum as they think proper as a reserved fund to meet contingencies, or for equalizing dividends, or for repairing or maintaining the works connected with the business of the company or any part thereof; and the directors may invest the sum so set apart as a reserved fund upon such securities as they may select," it could not be implied from the powers granted to the defendant company that its directors or it had any such power.

I am of the opinion that the defendant company had no such implied power, least of all the power to invest such reserved fund upon securities, or at all; but it is unnecessary to determine whether they had or not in this case, for, although one of its by-laws (No. 13) provided that "the directors may set apart any portion of the profits for a reserve fund, subject to the approval of a general meeting, or to the appropriation of such sum by such meeting to any other purpose," no such reserve fund was ever set apart and the books of the company shew no such account, and what is meant in the evidence when "reserve" or "reserved fund" is spoken of, is simply the sum shewn



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from time to time after the declaration of dividends to remain at the credit of the profit and loss account in the annual balance sheets of the business of the company.

An examination of the balance sheets for the different years during which the defendant company had been doing business, shews that the sums at the credit of the profit and loss account in such balance sheets, are in reality net profits as defined in the authorities dealing with that subject: *Dent v. London Tramways Co.* (1880), 16 Ch. D. 344; *Glasier v. Rolls* (1889), 42 Ch. D. 436; *Verner v. General and Commercial Investment Trust*, [1894] 2 Ch. 239.

And being net profits they were available for dividends and were in my opinion only applicable to that purpose, having regard to the powers of the company and the rights of the shareholders, and ought to have been so applied.

Instead, however, of so applying them, the defendant company, through their manager, the defendant George B. Burland, loaned them from time to time upon various securities, purchased bank stocks with them, and invested them in various other ways, and at the date of the last balance sheet, on the 31st of December, 1897, they stood at the sum of \$264,167.31, or nearly \$100,000.00 in excess of the paid-up capital stock of the company.

It was in effect creating a new business separate and distinct from and foreign to the purposes for which the defendant company was incorporated, and it cannot in my opinion be doubted that this employment of the net profits of the company was altogether beyond the powers of the company.

The sum of \$264,167.31, or a large part of it, stands in the name of the defendant George B. Burland as trustee for the defendant company.

It was argued that the plaintiffs having assented to this employment of the net profits, were disqualified from objecting to it, but although they may be disqualified from objecting to such employment in the past, they are not

disqualified from objecting to it in the future: *Bloxam v. Metropolitan R. W. Co.* (1868), L. R. 3 Ch. 337.

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The next objection is as to the payment of salaries, but this is a matter within the powers of the company, relates to the internal management of the company, and although not regularly ordered can be ratified, and no doubt would be ratified by the shareholders, and the Court cannot therefore interfere, and moreover the plaintiffs must be taken to have assented to it: *Hadley v. Hadley* (1897), 77 L. T. 131.

The next objection is as to the transaction with one Bennett. *Primâ facie* the evidence leads to the impression that this was a personal transaction of the defendant George B. Burland and not being a profitable one was put upon the company, but if he can shew that the money originally advanced to Bennett was the money of the company, he may have a reference for that purpose if he so elects, otherwise he must account for it.

The defendant George B. Burland being the president and manager of the defendant company, bought the plant, etc., of the Burland Lithographic Company for the sum of \$21,564, and by his advice and influence sold it to the defendant company for the sum of \$60,000, without disclosing to the company the price at which he had bought it, thus making a profit out of the transaction of \$38,436, and for this sum he is bound to account to the company, together with interest thereon.

In *Imperial Mercantile Credit Association v. Coleman* (1871), L. R. 6 Ch. 558, Lord Chancellor Hatherley said (p. 567): "The matter would be much more simple if the regulations of the association were in the ordinary form, if nothing whatever were said about directors interested or not interested, and if it were left to the ordinary operation of the rules of this Court, which lay down firmly that no director of a company can, in the absence of any stipulation to the contrary, be allowed to be a partaker in any benefit whatever from any contract which requires the sanction of a board of which he is a

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member. The reasons are given fully by the Vice-Chancellor Knight-Bruce in *Benson v. Heathorn* (1842), 1 Y. & C. C.C. 326, cited by the learned Vice-Chancellor in his judgment, and amount to this, that the company have a right to the services of their directors, whom they remunerate by considerable payments; they have a right to their entire services; they have a right to the voice of every director, and to the advice of every director in giving his opinion upon matters which are brought before the board for consideration; and that the general rule that no trustee can derive any benefit from dealing with those funds of which he is a trustee applies with still greater force to the state of things in which the interest of the trustee deprives the company of the benefit of his advice and assistance."

In *Cavendish Bentinck v. Fenn* (1887), 12 App. Cas. 652, Lord Herschell said (p. 658): "Of course it cannot be doubted that Mr. Fenn as a director of the company was in the position of an agent, and undoubtedly if he filled any fiduciary position towards them at the time when he purchased this property he would be bound to pay to the company the difference between the price at which he purchased it and the price at which it was sold to the company." See also *York and North Midland R. W. Co. v. Hudson* (1853), 16 Beav. 485; *Aberdeen R. W. Co. v. Blakie* (1854), 1 Macq. 461.

The plaintiffs are entitled to have the defendant George B. Burland account to the defendant company for his dealings and transactions as trustee with the net profits which have come into his hands, as such trustee, for six years prior to the commencement of this suit.

The plaintiffs are therefore entitled to judgment declaring that the net profits of the defendant company are applicable only to the payment of dividends and should be so applied accordingly; directing the defendant George B. Burland to account for his dealings and transactions as trustee for the defendant company with the net profits

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which have come into his hands as such trustee during six years prior to the commencement of this suit; to account for and pay over to the defendant company the money charged to the defendant company for a loan to Bennett, with interest thereon, unless it shall be shewn upon the reference above directed that the money originally advanced was the money of the company; directing the defendant George B. Burland to account for and pay over to the defendant company the profit made by him upon the sale by him to the defendant company of the plant, etc., of the Burland Lithographic Company, together with interest thereon; and directing the defendant George B. Burland to get in, account for, and pay over to the defendant company all such parts of the net profits of the company as are now held by him as trustee for the defendant company.

The plaintiffs are to have their costs up to and including the hearing against the defendants, other than the defendant company, as well as the costs of the reference, and further directions and costs will be reserved.

The appeal and cross-appeal were argued before OSLER, MACLENNAN, MOSS, and LISTER, JJ. A., on the 8th and 9th of December, 1899.

*Robinson*, Q.C., and *Hogg*, Q.C., for the defendants.

*Aylesworth*, Q.C., and *Chrysler*, Q.C., for the plaintiffs.

November 13th, 1900. The judgment of the Court was delivered by

MOSS, J.A.:—

The sum of \$264,167.21, in question, undoubtedly represents accumulated earnings or profits which might have been distributed in the shape of dividends to the shareholders: *In re Bridgewater Navigation Co.*, [1891] 2 Ch. 317; *Wilmer v. McNamara & Co.*, [1895] 2 Ch. 245; *Bishop v. Smyrna and Cassaba R. W. Co.*,



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[1895] 2 Ch. 265. Even if it were in the power of the company to transfer it into capital, that has not been done. Instead of dealing with it in either of these ways the company has through its president and manager been trafficking with it in bank stocks and the shares of other companies, besides investing some portions in loans upon mortgages of real estate. With it the company has been in substance engaging in a loan and brokerage business of a somewhat precarious character, as witness the losses on Consolidated, Federal, and Central Bank transactions. In effect there has been added to the company's authorized business a new and unauthorized branch in which there is engaged a separate capital exceeding by between fifty and sixty per cent. the subscribed capital embarked in the legitimate business.

It cannot be maintained that the accumulation of this large sum and the employment of it in the manner in which it is employed are within the powers of the company as matters incidental or auxiliary to its primary business.

I am of opinion that, having regard to the nature of the business which this company was incorporated to engage in and carry on, and the usual prudent measures which cautious business men adopt in the management of their business, it was within the powers of the company to provide as it did for the directors setting apart a portion of the profits for a reserve fund. And I also think that while such a reserve fund existed it would not only be prudent but a duty on the part of the directors to invest it in a proper manner. But on the other hand, I think the powers of the company and the directors in this regard are limited and do not extend to the creation of a fund so large as has been accumulated, nor to its employment in the manner in which it is being used.

It is to be observed that in the Act under which the company was incorporated, 27. & 28 Vict. ch. 23, there is no express provision enabling companies formed under it to create and keep a reserve fund.

In Brice on Ultra Vires, 3rd ed., at p. 348, the learned author gives what he says is probably a correct statement of the law as to keeping reserve or contingency funds in the case of companies where there is no express provision. He says: "(1). All companies may retain such a reserve as is necessary to meet current outstanding debts, or for repairs or renewals of works, plant, etc." Then after referring to the special cases of insurance companies, banks, discount associations, etc., he continues: "(4). Mercantile corporations not of the above description (and not endowed with express authority to keep such a fund) cannot do so, but must periodically divide their accrued profits." So that according to this learned writer the powers of a company in the absence of express provision are limited to making provision for comparatively few contingencies, and when these are provided for whatever of profit remains should be divided amongst the shareholders.

In *Lubbock v. British Bank of South America*, [1892] 2 Ch. 198, Chitty, J., after referring to the proper form of a balance sheet of a trading company and pointing out that the result of keeping an account in the proper form is to shew the assets and liabilities and the balance of the one over the other, says: "Now what is the result of keeping the account in this form? The capital of the bank is intact, and the account shews it, and after providing for the capital, there remains a surplus which rightly goes to the profit and loss account. All that the company is required to do, by force of the Companies' Act, is to keep its capital intact, and not to pay dividends out of its own capital; in other words, to keep that capital for its creditors, and any others who may be concerned therein. That mode of keeping the account is an excellent illustration of the right way to divide profit and loss."

In that case the directors were authorized to appropriate out of the profits in any year such an amount as in their discretion they should think proper and add it to the

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reserve fund which might be applied for equalizing dividends, effecting repairs, or meeting extraordinary expenses, and, at the discretion of the directors, for any other purposes of the bank. The learned Judge held that a sum of £205,000, which he found to be profits, or so much as should not be appropriated by the directors to the reserve fund, was distributable as dividends to the shareholders.

In Lindley on Companies, 5th ed., at p. 430, it is said: "And if a company after defraying all current expenses and the interest of its debts has a surplus arising from its current receipts there is no principle either of law or morality which requires that such surplus shall be accumulated or forbids its division as profits amongst the shareholders."

The learned author is probably dealing with the position of the company's creditors or of third parties, but nevertheless the rule stated seems equally applicable to shareholders. It is quite true that it is for the majority of shareholders to decide whether dividends shall be paid while debts remain unpaid, but when debts and all other contingencies have been provided for and there still remains a surplus of profits there seems to be no right in the majority to refuse to distribute it as dividends.

In the cases of banking corporations, insurance companies, and other companies carrying on business of a similar nature, there are good reasons why there should be power to set apart and maintain a very substantial reserve or reserve fund and why the power should be exercised in a liberal manner. The very nature of the businesses, the sudden exigencies to which they may be exposed, and the necessity for having at hand an immediately accessible fund to which recourse can be had in emergency, justify the adoption of such a policy. But in the case of a manufacturing company like the defendant company there is no principle of law or morality justifying the retention of such an accumulation of undrawn or undistributed profits as there now is in this case. Not only is such retention

an act in excess of the corporate powers but it has led to dealings in the shares of other corporations and the creation of a loaning business, both matters *ultra vires*: Brice, 3rd ed., pp. 130, 131, 132, and 139.

It is, however, argued that the retention and continued investment of these accumulations is a matter of internal regulation and management to be determined by the voice of the majority of the shareholders and that the court will not interfere.

That the court will not ordinarily interfere in internal affairs of corporations is now beyond argument. But that there may arrive a time in the management of a company's affairs when jurisdiction attaches and it is the duty of the court to interfere is equally well settled. Thus a corporation may not through the majority of its shareholders propose to do or to continue doing an act in excess of its corporate powers, for, as remarked by Mr. Brice, what the corporation itself as a united whole cannot do, *a fortiori* a majority, however great, of its members cannot do.

So though the act be not, strictly speaking, *ultra vires*, if it be tainted with fraud or operates oppressively on individual shareholders. Dealing with the last exception Mr. Brice, at p. 738, mentions as instances (a) where the assets have been devoted to purposes not within the corporate business or enterprise; or (b) where assets, *e.g.*, profits, which all the corporators are entitled to have divided amongst them in a certain manner, even while the corporation is a going concern, are not so divided.

In the American courts the power of interference and the right to interfere are perhaps more freely recognized and accorded. See Morawetz on Private Corporations, 2nd ed., sec. 447. But it is unnecessary to refer to the many decisions. I think the circumstances of this case justify the interference of the court. Apart from the *ultra vires* aspect, the attitude of the majority with reference to the retention of the whole of the sum of \$264,167.21 as a reserve fund is not justifiable. Those

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composing the majority are all members of Mr. G. B. Burland's family or connected with him. Most of them are in the employment of the company and are in receipt of lucrative salaries. They can well afford to agree with Mr. G. B. Burland, whose view seems to be that he can manage the plaintiffs' share of this accumulation better than they can themselves. Mr. Burland's friends may be quite willing to entrust him with the management of their shares of the accumulations, but they have no right to insist that the plaintiffs shall be placed in the same boat as regards their part.

On the other hand the plaintiffs are not in receipt of salaries from the company, and if the proper conclusion be that there is a large sum of undistributed profits, they are entitled to receive their shares and to deal with them as their own and in their own way. They are not bound to permit their shares to remain locked up at the will of the majority and to submit to their continued employment in precarious and illegal investments. The majority of the shareholders by their resolution passed at the general meeting of the 1st of February, 1898, declared it to be the intention of the company to maintain this large sum as a rest or reserve and authorized its continued investment and they instructed the management to continue the business as theretofore. The reasons urged in support of this course seem altogether insufficient to justify it even if such proposed action were within the corporate powers of the company.

I think, therefore, the court should interfere, but not to the extent to which the judgment appealed from has gone. I think there is power in the directors or the shareholders to set apart a fair and reasonable sum out of the profits as a reserve fund. I think the action of the shareholders at the general meeting of the 5th of September, 1876, in adopting the directors' report in which it is set forth that they reserved sufficient out of the profits to pay next year's expenses and declared a dividend of 15 per

cent., leaving \$44,022.32 to the credit of profit and loss account, may well be considered an act done under by-law No. 13, and that the sum of \$44,022.32 may be deemed to have been set apart by the shareholders for a reserve fund. No subsequent action of the shareholders in the way of distinct recognition of a so-called reserve fund appears until after the commencement of this action. The \$44,022.32 was reserved to meet the next year's expenses but was not needed for the purpose. Still, having been reserved, it continued a reserve in the absence of other action on the part of the shareholders.

Judgment.

MOSS, J. A.

I see no reason why it should not be declared that this sum formed the reserve fund of the company at the commencement of this action and that the balance of the \$264,167.21 is distributable amongst the shareholders as undrawn profits, as such funds are termed by Lindley, L.J., at p. 327 of *In re Bridgewater Navigation Co.*, [1891] 2 Ch. 317. And I think these declarations should be substituted for the second paragraph of the judgment. I do not think any declarations should be made as to the destination of any sums for which the defendant G. B. Burland may be found to be accountable and liable. If there be any such they should be left to be dealt with by the company in its subsequent accounts and balance sheets. But the defendants, G. B. Burland and the company, should be restrained from in any way dealing in the shares of other corporations with the company's funds or any part of them.

The defendants have also appealed against that part of the judgment which declares the defendant G. B. Burland liable to account to the company for his dealings with the funds of the company, invested by him and in his name, but there is no reason why he should not account as agent to invest under the resolution of the Board of November 18th, 1872.

The next subject of appeal is that part of the judgment which declares the defendant G. B. Burland liable to

Judgment.  
MOSS, J.A.

account for and pay over to the company the profits made by him on the sale to the company of the plant, machinery, and materials, of the Burland Lithographic Company.

I think it established upon the evidence that in becoming the purchaser of the plant and other property in question from Duff, the assignee of the Burland Lithographic Company, Mr. Burland did so having in view and contemplation the immediate handing over or transfer of it to the British American Bank Note Company, of which he was the president and general manager with a large salary. It was deemed important to connect the lithographic business with the business of the British American Bank Note Company. Mr. Burland says that one of the principal reasons for the company making the purchase was "to connect that business, which had four or five different branches, to this business and to carry them all under the one head and control the different branches and get the benefit of the profit to be made by carrying on that business." This was, of course, well known to Mr. Burland when he made the offer or bid for the property on the 10th of May, 1892. His intention then was that the property should be immediately acquired by the British American Bank Note Company. It was not in his mind to make a sale to some other company or person or carry on the business separate from the company. All his subsequent actions are opposed to such a notion. He did not immediately close the transaction with Duff, pay the price, and get the bill of sale. His first act was to call a meeting of the directors for the 2nd of June, 1892, and a meeting of shareholders for the same day, for the purpose of considering and authorizing the purchase of the property. His next was to put the company into possession of the property before the meeting. And the company having on the 2nd of June resolved to purchase from him as the owner at \$60,000, he on the 7th of June procured a bill of sale from Duff and paid him, presumably with money from the company, the sum of \$21,564.

Judgment.

MOSS, J.A.

The desirability of the company acquiring the property being apparent, what was the duty of the president and general manager? Surely to endeavour to acquire it for the company and not to purchase for himself. And he could not make a profit out of the transaction unless by the unanimous consent of all the shareholders, given after full explanation of all the circumstances and full knowledge of the position. The defendant Burland relies upon the proceedings at the directors' and shareholders' meetings and the resolutions there adopted. But he has failed to establish that these were concurred in by all the shareholders of the company. The plaintiff Jane Taylor Gillelan, who was the holder of 104 shares in 1892, was not present. And it is not established that those present, except the defendant G. B. Burland himself, were aware or had explained to them that G. B. Burland had acquired the property for \$21,564. The plaintiffs Earle and T. J. Gillelan, deny knowledge until afterwards. Upon the minutes of the shareholders' meeting Earle appears as the mover of the resolution approving of the purchase from G. B. Burland at \$60,000, but he denies that he was the mover and says that he was asked to become seconder and refused and that at the next meeting when the minutes were read he protested against the record. In this he is corroborated by the plaintiff Goodeve. I think the judgment ought to be affirmed as regards this transaction. The judgment of the Judicial Committee in *North-West Transportation Co. v. Beatty* (1887), 12 App. Cas. 589, does not support the appellant's contention. On the contrary there is in it much to shew that this transaction should not be upheld.

The next ground of appeal is in respect of a transaction with one Bennett. The judgment declares that the defendant G. B. Burland is liable to account for and pay over to the company all moneys which he has charged against the company in respect of the transaction, unless he shall establish, upon the reference to take account of



Judgment.

MOSS, J.A.

the investment transactions, that the transaction was a loan by the company to Bennett. Upon the evidence I think this is a very favourable disposition of the matter for the defendant G. B. Burland, and it ought not to be disturbed.

The last ground of the appeal is against the disposition made of the costs of the action. As regards the retention of the accumulations there has been a long course of usage acquiesced in by all concerned, and the true rights of the parties in respect of it was a fair question. The defendants have not been found to be wholly in the wrong and in my view the judgment appealed from went farther than was warranted.

A fair disposition of the costs would be that so much of the costs up to the trial as are attributable to the question of the rights of the parties in respect of the accumulated fund and the costs of the appeal should be paid out of the fund, and that all the other costs, including the costs of the reference, be reserved until after the Master has made his report.

The judgment to stand save as hereby varied.

There remains the cross-appeal of the plaintiffs in respect of the salaries of the defendants G. B. Burland and J. H. Burland. Besides holding the positions of president and vice-president, respectively, these defendants are respectively named as the general manager and managing director of the company. Since the year 1889, or perhaps 1890, the defendant G. B. Burland has been drawing \$17,300 or thereabouts annually for salary, and J. H. Burland has been drawing \$3156 annually for salary. The plaintiffs object that there is no warrant for these payments, or, at any rate, that they are excessive. The learned Chief Justice was of the opinion that this was a matter relating to the internal management of the company, and that, although the payments were not ordered, they could be ratified and no doubt would be ratified by the shareholders. In other words, that the majority of the

shareholders being who they are in this case may be trusted to ratify any act of the president and general manager or vice-president and managing director. But it is to be borne in mind that there are certain exceptions to the wide powers of the majority to bind the minority. And if it be found that two prominent officials are withdrawing the company's funds and applying them to their own use without legal warrant and that the same officials hold or control a majority of the shares, the court will not hesitate to protect the objecting minority, otherwise it would be in the power of the majority to defraud the minority with impunity: *Mason v. Harris* (1879), 11 Ch. D. 97, *per* Jessel, M.R., at p. 107; Brice, 3rd ed., p. 731; *York and North Midland R.W. Co. v. Hudson* (1853), 16 Beav. 485, at p. 494.

Judgment.

MOSS, J.A.

The question here is whether the president and vice-president are entitled to withdraw the amounts they are withdrawing under the head of salaries. It is not pretended that any part of these amounts has been voted or awarded to them as compensation for services as directors under the company's by-law (No. 9). But it is claimed that they are salaried officials, and that the amounts they are receiving have been settled and fixed by the directors as the salaries they are entitled to.

Mr. G. B. Burland holds the position of general manager, and on the 9th of February, 1879, the board of directors resolved that his salary should be \$5000 per annum. On January 11th, 1881, this was increased to \$7500. On September 14th, 1882, it was again increased to \$10,000, and on September 6th, 1887, it was further increased to \$12,000.

Mr. J. H. Burland was appointed secretary of the company on the 7th of September, 1886, at a salary of \$3000 per annum. He continued to hold that office until the 28th of May, 1895, when he was elected vice-president, and the defendant Valleau was appointed secretary. On the 13th of March, 1897, he was appointed managing

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MOSS, J.A.

director, which office he still continues to hold. Therefore from May, 1895, to March, 1897, the only position he held was that of director and vice-president. But, during this period and ever since, he has continued to draw a sum of \$3156 per annum for salary, which seems to be without any warrant or authority. Upon his ceasing to be secretary his salary as such ceased and there does not appear to have been any resolution of the board or shareholders giving him a salary or compensation as vice-president or managing director and in the absence of agreement he was not entitled to compensation for services rendered in these capacities. He could not be considered as a servant of the company and as such entitled to remuneration for his labour according to its value: *Dunston v. Imperial Gas Light and Coke Co.* (1832), 3 B. & Ad. 125; *Hutton v. West Cork R.W. Co.* (1883), 23 Ch. D. 654, *per* Bowen, L.J., at p. 672. He has not been voted any sum as a gratuity and the moneys he withdrew from the funds of the company since ceasing to be secretary he is bound to restore to the company: *In re Oxford Benefit Building Society* (1886), 36 Ch. D. 502, at p. 517; *Re Whitehall Court, Limited* (1887), 56 L. T. 280; *In re George Newman & Co.*, [1895] 1 Ch. 674.

But this is only a portion of the amount which the plaintiffs claim should be restored by these two defendants, and the question is to what greater extent, if any, are they bound to make restitution. The salary of \$12,000 per annum voted to G. B. Burland in 1887, and the salary of \$3000 per annum awarded to J. H. Burland as secretary, cannot, I think, be interfered with. As before stated, from 1889 or 1890 G. B. Burland has been drawing \$17,300 or thereabouts, and J. H. Burland \$3156. They claim to be entitled to the difference of \$5300 and \$156, respectively, by virtue of a resolution of the directors passed on the 24th of April, 1888. I think it is plain, not only from the evidence but also upon the face of the resolution, that it was never intended to apply to Mr. G.

B. Burland, the president and manager. I do not think he comes under the category of the staff, and the resolution only applies to the staff who were to be compensated for difficulties incurred owing to the removal of the company's works to Ottawa. It was obviously intended to apply to the cases of those holding positions in the employ of the company under the general manager, such as Messrs. Goodeve and Ross, the former of whom was a shareholder in the company. If it had been intended to include the president and general manager it probably would have been worded differently. I think, therefore, Mr. G. B. Burland is bound to restore to the company all sums he has withdrawn as salary in excess of \$12,000 per annum.

But Mr. J. H. Burland was of the staff while he was secretary and the resolution applies to him as long as he held that office.

To the extent indicated the cross-appeal should be allowed with costs against the defendants G. B. Burland and J. H. Burland.

*Appeal dismissed, and cross-appeal allowed in part.*

R. S. C.

Judgment.

MOSS, J.A.



# McDOUGALL V. WINDSOR WATER COMMISSIONERS.

*Municipal Corporations—Board of Commissioners—Contract—Breach—Statutory Restrictions—Evasion of Statute.*

The waterworks system of the City of Windsor is, by 37 Vict. ch. 79 (O.), placed under the management of a Board of Commissioners who are authorized to collect the revenue, paying to the city any surplus over expenditure for maintenance, and to initiate works for the improvement of the system, the necessary funds in that event to be supplied by the city. The total expenditure is limited to \$300,000, to be provided from time to time by by-law of the Council, and not more than \$20,000 to be expended in any one year without the assent of the rate-payers. A majority of the Commissioners wished to make certain improvements, but on finding that the cost would be over \$40,000 decided to carry out at the time only one half the proposed scheme, and they entered into a contract with the plaintiffs to do work of the value of \$20,000. No by-law had been passed by the Council, and at the time more than \$280,000 had been expended by the city for waterworks purposes, and the plaintiffs knew these facts. After a small portion of the work had been done a ratepayer threatened litigation, and the Commissioners instructed their engineer not to issue a progress certificate, and the plaintiffs brought this action to recover the value of the work done:—

*Held*, that the Commissioners had in good faith divided the work; that there was, therefore, no illegal evasion of the statutory restrictions, and that the contract was not invalid on this ground.

But *held* also that the Commissioners were mere statutory agents of the city, and that as there was no by-law of the Council, and the statutory limit of expenditure was to be exceeded, the contract was not binding. Judgment of *BOYD*, C., reversed.

## Statement.

APPEAL by the defendants from the judgment of *BOYD* C., at the trial, in favour of the plaintiffs, in an action to recover \$892, the value of certain work done by the plaintiffs in connection with the improvement of the waterworks system of Windsor. An outline of the facts is given in the head-note and they are stated in detail in the judgments.

The appeal was argued before *BURTON*, C.J.O., *OSLER*, *MACLENNAN*, *MOSS*, and *LISTER*, J.J.A., on the 23rd of January, 1899. On the 9th of May, 1899, the appeal was disposed of in part, as explained in the judgment of *MOSS*, J.A., and after further evidence had been given the remaining questions stood over for consideration.

*Aylesworth*, Q.C., for the appellants.

*Riddell*, Q.C., and *J. L. Murphy*, for the respondents.

November 13th, 1900. OSLER, J.A. :—

Judgment.

OSLER, J.A.

The action is brought upon an agreement bearing date the 7th of November, 1896, made between the plaintiffs and the Water Commissioners of the City of Windsor, whereby the plaintiffs agreed for the price of \$20,000 to erect, instal and complete for the defendants a filtration plant, consisting of five filters. The defendants covenanted to pay the plaintiffs ninety per cent. on account as the work proceeded, on the value of the same in proportion to the amount to be paid for the whole work, and the balance was to be paid in sixty days after the completion of the work, and a statement of the balance had been rendered to the engineer. The progress estimates of ninety per cent. were to be paid upon the certificate of the city engineer, to whose satisfaction and under whose supervision the work was to be done. The plaintiffs allege that they have done work upon the contract to the amount of \$991 in respect of which they were entitled to receive progress estimates and certificates of the engineer to the amount of \$892, and to be paid that sum thereupon, but that the engineer, acting upon instructions and directions of the defendants, has refused to give such certificate. This sum, either as a debt or as damages for breach of contract, the plaintiffs seek to recover, and they also claim it as damages against the engineer, the defendant Newman, alleging that he fraudulently and in collusion with his co-defendants withheld the certificates.

In their defence the Water Commissioners plead that under the statute incorporating them they are merely agents for the City of Windsor for the purpose of managing the city's system of waterworks, and that the city should be a party to the action; that the city had determined, as the result of the settlement of certain litigation between them and the town of Walkerville relating to the alleged pollution of the water supply of the city by the drainage of the town, to extend their intake pipe beyond or above

Judgment.

OSLER, J. A.

the point of discharge of the Walkerville sewage; that two of the Water Commissioners, one of them being the Mayor of the City of Windsor, were opposed to this mode of settling their difficulties, and resolved to procure the plaintiffs to make a tender for putting in their filtration plant; that this was done for the purpose of benefiting the plaintiffs and of thwarting the city's intended arrangement; that following the tender a resolution was passed by the two Commissioners in question, being a majority of the Board, to enter into a contract with the plaintiffs for a polarite filter plant consisting of ten filters, with a capacity of three million gallons daily, for \$42,000.

It is alleged that the plaintiffs knew that the water supply required by the town was about this quantity; that such a contract as they proposed to enter into would require the agreement not only of the council but of the ratepayers of the city pursuant to the statute, the amount required to be paid thereunder being over \$20,000; that the contract was accepted subject to such agreement; and that the plaintiffs indemnified the Commissioners from all personal liability in connection with it and as regarded its legality.

Thereafter it was represented to the plaintiffs that the city would refuse to ratify the contract, and accordingly with the view, as it is alleged, "of perpetrating a fraud upon the City of Windsor, it was determined to divide the contract into two portions," whereupon the contract of the 7th of November, 1896, was executed, upon the same terms and specifications as the former, save that the plant was to consist of five filters instead of ten, and the price to be paid was \$20,000. It is further alleged that the plaintiffs knew that the contract would be invalid without the consent of the city, inasmuch as the necessary funds could only be procured or provided by the city; that a filter plant of the capacity of 1,500,000 gallons daily was absolutely inadequate for the purposes of the city, and that a further contract would have to be let doubling the

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OSLER, J.A.

capacity; that the plaintiffs however, and the Commissioners, hoped with the aid of the city council to carry out their alleged scheme, and that the plaintiffs indemnified the Commissioners against all liability in connection with the contract; that the plaintiffs knew that no funds had been provided by the city to meet the expenditures contemplated by the contract, and that the defendants had no funds which they could legally appropriate thereto; that the defendants had no authority from the council of the city to enter into the contract; that the plaintiffs proceeded with the work on their own responsibility and never became entitled to a certificate from the engineer; and, generally, the defendants say that they are not liable to the plaintiffs in respect of the contract; that it was fraudulently entered into in order to defraud the city; that the city has repudiated it; and that the defendants have no funds, or means of procuring any, to pay for the work even if it be performed.

At the trial it appeared that for some time previous to 1894 difficulties had arisen between the Town of Walkerville and the City of Windsor in regard to the pollution of the source of the latter's water supply, and proceedings had been taken against the former either by indictment or information at the suit of the Attorney-General to restrain the nuisance caused by the discharge of the town sewage into the river. In 1893 that litigation was terminated by an agreement the precise terms of which do not appear, having for its object the carrying of Windsor's intake pipe to a point above that at which Walkerville's sewage was discharged. In 1894 an Act was obtained, 57 Vict. ch. 87 (O.), at the instance of the Water Commissioners, by which the city was authorized to issue debentures to the extent of \$200,000 in addition to the amount already authorized to be issued by them under their Water Works Act, 37 Vict. ch. 79 (O.), hereafter referred to, for the purpose of extending the water mains, constructing a new intake pipe, and repairing their water works. This Act appears



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OSLER, J.A.

to have been passed with the view of enabling the town to carry out the arrangement referred to, but the whole seems also to have been dependent upon its being one acceptable to the ratepayers, and perhaps also upon the concurrence of the ratepayers of Walkerville. However that may be, the scheme turned out for some reason to be impracticable. It was nevertheless necessary for the city to do something towards relieving the situation, as the Provincial Board of Health was insisting upon it in order to get rid of typhoid fever which had become endemic there, owing, as was supposed, to the foul condition of the water. In 1896 two of the three members who then composed the Board of Water Commissioners, viz., the Mayor and Dr. Casgrain, advocated the establishment of a filtration plant sufficient for the daily supply of three millions of gallons. The third Commissioner was opposed to it, and so, I gather, were a considerable number of the inhabitants. Tenders were called for, and the plaintiffs' tender for the placing and completion of ten filters for the price of \$42,000 was accepted, and a contract was prepared, which was signed by the plaintiffs but not by the Commissioners, bearing date the 30th July, 1896. This, as the plaintiffs declared by their letter of that date, was not to be binding on the Board unless and until the Board had proper legal authority to enter into the same, either by by-law voted on by the ratepayers or in any other manner which might be according to law.

It was in evidence that under the city's water works Act of 1874, their power to raise money by by-law, within the \$300,000 limit, without assent of the electors, was limited to \$20,000 per annum; and it appeared at least doubtful, as the parties were advised, whether under the Act of 1894 they could borrow at all with or without the assent of the electors for the purpose of such a scheme as the contract provided for.

As the January municipal election approached it began to appear that public opinion was opposed to this scheme

also, and that even if the \$42,000 could be legally borrowed under a by-law passed with the assent of the electors, their assent would, probably, be withheld.

Judgment.

OSLER, J.A.

The majority of the Commissioners then determined to adopt a smaller scheme and to put in a filtering plant of five filters instead of ten, at a cost of \$20,000 instead of \$42,000. The contract which is the subject of the present action was then entered into, as it was considered that it would only involve an expenditure within the power of the council to raise money for without the consent of the electors. It was strongly urged at the trial, and again before us, that this was merely a cutting of the contract in two—a device or scheme to avoid the necessity of going before the electors with a by-law which they would certainly reject, by spending \$20,000 this year, intending to enter into a new contract for five filters more next year, with a further expenditure bringing the amount up to the sum originally intended. And it was said that the modified scheme was one which would not remedy the evil complained of as it would not produce the quantity of pure water necessary for the purposes of the town. The defendants waived all question as to the engineer's certificate, conceding that as litigation was threatened by a ratepayer, if it had not actually begun, to restrain them from acting under the contract, just about the time at which the plaintiffs had done the work which they were now suing for, they had directed their co-defendant, the city engineer, Newman, not to certify.

The learned Chancellor was of opinion that in abandoning the first contract and entering into that of November, 1896, the defendants were acting in the public interest with the real intention of avoiding the legal difficulties in the way of carrying out the former; that if by incurring a smaller expenditure they could get on without the popular sanction, it became simply a question whether it was worth while to do so—whether, in short, the smaller scheme would be useful, as on the evidence he held it was bound

Judgment.

OSLER, J.A.

to be; the intake pipe having been carried out into the river into clear water beyond the line affected by the sewage flow. Whether the plaintiffs could make any use of their judgment was a question he thought was not before him but upon the facts he held them entitled to judgment for the value of the work done in accordance with the terms of the defendants' covenant.

On the argument of the appeal we were of opinion that the engineer ought not to have been made a party to the action, and that, as against him, it should have been dismissed, there being an entire absence of evidence of any fraud or collusion on his part under the circumstances.

The question, therefore, is whether the action is maintainable against the other defendants, the Water Commissioners.

It is conceded that nothing turns upon the absence of the certificate.

I have considered the evidence with care and am of opinion, agreeing in this respect with the learned Chancellor, that there was nothing fraudulent in the contract. If the first plan was not likely to be practicable because it involved an expenditure which the electors were not likely to sanction, or was beyond the borrowing powers of the city, and if the Commissioners, or a majority of them, honestly thought that a useful scheme could be carried out by means of a smaller expenditure not dependent upon the assent of the ratepayers and within the borrowing powers of the council, I cannot see why they were not at liberty to adopt it, if it were otherwise in their power to do so. I think there was no cutting of the contract in two, as it was called, with the intent to evade, as it were, the obligation of procuring the assent of the ratepayers by expending \$20,000 this year and another \$20,000 next year. I regard it as a single contract for an entire scheme, which it was supposed would be a useful one, and not open to the objection which I have thus dealt with.

Other objections are, however, urged against the plaintiffs' right to recover, some of which strike me as extremely formidable. It was contended that the City of Windsor was a necessary party to the action; that the Commissioners were merely their agents, having no power to borrow money, and no funds or property of their own wherewith to meet the expenditure contemplated by their contract; and that the city not having provided the means for carrying it out and being in fact opposed to it, the contract was beyond the powers of the Commissioners and could not be enforced. The evidence also pointed to the fact that the borrowing powers of the municipality under the Act of 1874 had been so far exhausted that a sum less than the amount of the contract price of the new works remained to be raised thereunder. We gave the plaintiffs leave to procure if they could the consent of the City of Windsor to be made a party to the action, and to adduce further evidence as to the extent to which the borrowing powers of the latter had been exercised, and the amount still raisable under the Act of 1874. The parties were then to be at liberty to argue the case further as they might be advised on the points above indicated. The plaintiffs failed to obtain the consent of the city to be added as parties, and having taken some additional evidence as to the amount which might remain to be raised under the Act of 1874, the case was submitted for judgment as regarded the Commissioners without further argument by either party. From the further evidence thus adduced, read in connection with the evidence at the trial, it appears that on the 7th of November, 1896, the date of the contract on which the action is brought, there remained which could be raised of the sum of \$300,000 originally authorized no more than the sum of \$18,716. Of this the plaintiffs were aware, and they also knew that no by-law had been passed by the city to raise this balance, and that no debentures therefor had been issued, as provided by section 33 of the Act hereafter referred to.

Judgment.

OSLER, J.A.



Judgment.  
OSLER, J.A.

In disposing of this branch of the case it becomes necessary to consider the material clauses of the Act under which the defendants derive their powers.

Previous to the year 1874 the Town of Windsor (which has since been "erected" into a city: Municipal Act, R.S.O. ch. 223, s. 21) had constructed a system of waterworks, which, as in the case of many other municipalities about the same period, it was thought could be managed more successfully by a body of commissioners than by the town council.

An Act was accordingly obtained, viz: An Act respecting waterworks in the Town of Windsor, 37 Vict. ch. 79 (O.), passed, as the preamble states, on the petition of that corporation "in order to provide for the better working, management and extension of the said waterworks," and the defendants (sections 1-2) were created a body corporate under whose management the works then or thereafter to be constructed were placed, with power to design, construct, build, purchase, improve, alter, hold, and generally maintain, manage and conduct waterworks and all buildings connected therewith or necessary thereto, and with matters, machinery and appliances therewith connected or necessary thereto, and with all powers necessary to enable them to manage the system of waterworks then established, to extend the same, to construct new or additional works, and to carry out all and every the other powers conferred upon them by the Act.

Section 3 makes it the duty of the commissioners to examine, consider and decide upon all matters relative to the supply of the town with a sufficient quantity of pure and wholesome water for the use of its inhabitants.

Section 4 authorizes them to employ engineers, surveyors, etc., and to rent or purchase such lands, buildings or premises as they may deem necessary to enable them to fulfil their duties.

Section 5 empowers them to enter into agreements for the purchase of lands, privileges and waters for these pur-

poses, to expropriate the same, and to have the price settled by arbitration if they cannot agree.

Where there has been arbitration, the remedy in case of non-payment of the purchase money seems to be that the owner may re-enter and the proceedings are at an end; there is at least that special provision made for that particular case.

By section 15 the commissioners are authorized to prosecute or defend actions, *inter alia*, for the breach of any contract touching the execution or management of the works or of any promise or contract made to or with them. See also the Interpretation Act, R.S.O. ch. 1, section 8 (25).

Section 45 speaks of "the provisions of this Act authorizing the working, management and extension of the waterworks of the Town of Windsor through the agency of commissioners."

By section 6 all the lands, privileges and water set out and appropriated by the commissioners under the powers conferred by section 5 for the purposes of the undertaking are vested in the corporation of the town, and all the waterworks, pipes, erections and machinery requisite for the undertaking are likewise vested in and declared to be the property of the town.

See also section 9 which speaks of the works being "under the charge" of the commissioners, and sections 11 and 37; the latter empowers the town to dispose of any real or personal property acquired by them for waterworks purposes, when no longer required, and, until sold, to demise and lease the same.

Section 13 provides that all water rents and water rates when collected, less *disbursements* by the commissioners, shall be paid over quarterly by the commissioners to the treasurer of the town.

By section 36 all the revenues arising from or out of the supplying of water, or from the real or personal property connected with the waterworks, shall after providing for the *expenses* attendant upon the *maintenance* there-

Judgment.

OSLER, J.A.

Judgment.

OSLER, J.A.

of be paid over to and deposited quarterly with the town treasurer, and shall make part of the general funds of the corporation and may be applied accordingly.

Section 33 confers powers upon the town corporation "for the purpose of acquiring the necessary lands, rights and privileges for the extension and repairs of the said waterworks or for the purpose of meeting the payment of any other matter or thing contemplated or allowed by the Act," to issue in the prescribed manner debentures of the town, to be called waterworks debentures, for a sum not exceeding \$300,000, inclusive of waterworks debentures then already issued. But every by-law for raising upon the credit of the municipality any money additional to that already raised for waterworks purposes is to receive the assent of the electors as provided by the Municipal Act, except that the council may raise by by-law or by by-laws without submitting the same to the electors any sum or sums not exceeding in any one year \$30,000 for waterworks purposes. By the Act of 1894, 57 Vict. ch. 87 (O.), to amend the principal Act, the amount which may be so raised in any one year is restricted to \$20,000.

Section 34 enacts that the proceeds of the debentures shall be paid into a bank and kept separate from any other funds of the town, and only paid out in the prescribed manner as may from time to time be required for the payment and discharge of the liabilities that may be incurred in carrying out the improvements contemplated by the Act, and for payment of interest accruing on the debentures during the period of the erection and completion of the works. Provided that nothing shall prevent the commissioners, if they deem it advisable, from paying the contractor in debentures at par or at such rate of discount as they may deem advisable with the assent of the town, nor from selling them.

The general provisions of this Act are of a somewhat similar character to those of other Acts passed about the same period for a like purpose. In some of these, *e.g.* the

Toronto Act, 35 Vict. ch. 79 (O.), and the Peterborough Act, 37 Vict. ch. 78 (O.), the status of the commissioners as agents of the municipal corporation is more expressly declared by enacting that the municipal corporation "by and through the agency of commissioners," who are created a corporation, shall have and may exercise the powers subsequently conferred upon the commissioners and their successors.

The Ottawa Act, 35 Vict. ch. 80 (O.), which says nothing about agency, seems to place the commissioners in that respect in a more independent situation, although they can rent or purchase property for the purposes of their works only with the assent of the city.

I think the commissioners are to be regarded, as were those appointed under the Toronto Act, as the statutory agents of the corporation for many purposes: *Ridgway v. Toronto* (1878), 28 C.P. 579; *Bailey v. Mayor of New York* (1842), 3 Hill (N.Y.) 531. They evidently have a large discretion as to the system to be adopted, the method of managing the works, and the contracts into which they will enter for purposes of carrying them out. These contracts are intended to be entered into by them in their own corporate name, and the Act does not in terms require any prior assent thereto on the part of the city. And it seems also clear that in relation to such contracts they may sue and be sued in their own corporate name. Nevertheless inasmuch as they have no funds or property of their own which they can apply for the purposes of such a contract as that in question, they are wholly dependent therefor upon money raised or to be raised by the paramount authority, the city, for such purposes, under the borrowing powers of the latter. The city is the principal, the commissioners, the agent. The exercise of the city's powers to raise money under section 33 without the assent of the electors is facultative not imperative, and until the city has manifested its intention that works shall be proceeded with by passing a by-law for raising the funds necessary to pay

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for them, the hands of the commissioners are tied, and they are as powerless to enter into a contract involving an expenditure of \$20,000 as into one involving a larger sum, which can only be raised by a by-law assented to by the electors.

It appears to me, therefore, that the council, or the electors speaking by their by-law, in either case are the paramount authority, and that the commissioners cannot force their hand by entering into contracts which call for an expenditure which has not been authorized, though it may be within the corporate power to provide for it. I refer to *Ottawa v. Keefer* (1896), 23 A.R. 386, merely to shew that it has not been overlooked.

But even if the commissioners could contract without the passage of a by-law to provide the money, their power to do so must at least be circumscribed by the borrowing powers of the city, and if these have been exhausted, where is the power of the commissioners to contract for the execution of works, or of works which by the terms of the contract are to cost more than the borrowing powers of the city extend to? In the case at bar no moneys have been provided by the city for the purposes of the contract. No by-law has been passed, and there are no debentures or proceeds of debentures at the disposal of the Commissioners under section 34, and the contract into which the plaintiffs, knowing these facts, have entered with the Commissioners calls for an expenditure greater than the city can now provide for under the Act. It has not been argued that the city's borrowing powers under the later Act of 1894 extend to works of the character the contract provides for.

For these reasons I am of opinion that the contract was ultra vires the Commissioners, and that the plaintiffs cannot recover thereon. The case, I may add, differs from such cases as *Frontenac v. Kingston* (1871), 30 U.C.R. 584; *In re Johnson and Harwich* (1870), 30 U.C.R. 264; and *Wentworth v. Hamilton* (1874), 34 U.C.R. 585; where there was a legal demand founded upon a statutory or

other obligation for which the plaintiff was held entitled to recover a judgment, though the means of making it exigible, at the time at least, were wanting. The appeal must, therefore, be allowed, and the action dismissed with costs.

Judgment.

OSLER, J.A.

MOSS, J.A. :—

The defendants' appeal from the judgment of the Chancellor was partially disposed of by this Court on the 9th of May, 1899. It was then adjudged that the appeal should be allowed as respects the defendant Newman, and the action dismissed as against him. It was pointed out that the nature of the case made it very proper that the City of Windsor should have been a party defendant to the action and that further enquiry should be made as to the debentures still remaining to be issued for waterworks purposes under the Act 37 Vict. ch. 79 (O.) at the date of the alleged agreement sued on in the action. And it was ordered that upon the City of Windsor consenting to become a party defendant and to be bound by the proceedings already had and taken, the plaintiffs were to be at liberty to amend their case and pleadings by adding the city as defendant, with apt words to charge it in respect of the relief claimed. It was also ordered that the plaintiffs or other parties be at liberty to adduce evidence before the Master at Sandwich to shew the amount of debentures that had been issued under sec. 33 of the Act, and including the debentures (if any) issued for waterworks before the passing of the Act, and the amount of debentures remaining unissued under said section ; such evidence to be taken after the city was added as a party in the event of its becoming a party. It was also ordered that upon the return of such evidence any of the parties should be at liberty to bring the matter on for further argument, and the consideration of all other questions was reserved until the further hearing of the appeal.

Judgment.

MOSS, J.A.

The City of Windsor declined to consent to become a party defendant, and on the 13th of February, 1900, the plaintiffs adduced before the Master at Sandwich the evidence of the treasurer of the City of Windsor to the effect that \$100,000 of debentures were issued before the passing of 37 Vict. ch. 79 (O.), that at the date of the alleged agreement, viz., the 7th of November, 1896, the amount of debentures that had been issued for waterworks purposes was \$281,284, and that the amount remaining unissued was \$18,716.

On the 7th of June, 1900, the plaintiffs moved for leave to read and use upon the further argument of the appeal certain affidavits together with and in addition to the evidence taken before the Master. On the 29th of June the leave asked for was refused, and the parties were heard upon the case as provided by the order of the 9th of May, 1899. It now remains to dispose of the question left to be dealt with after the production of the further evidence.

The substantial purpose of the action is the recovery from the defendants, the Water Commissioners, of the sum of \$892.41, being 90 per cent. of the sum of \$991.56 which the plaintiffs alleged had been earned under the contract upon which they rely. That is how it was regarded by the learned Chancellor, who said in giving judgment: "I think it was a valid contract executed by this corporation which binds them, and as to which [the plaintiffs] should have judgment with costs for \$892, and not saying how it should be levied." And he directed judgment to be entered for the plaintiffs for \$892, together with interest from the 20th of January, 1897.

The important question therefore is whether, assuming all parties to have acted in good faith, there is a valid subsisting contract binding upon the Commissioners as found by the learned Chancellor. That depends upon the powers of contracting which the Commissioners possessed at the date of the contract.

Prior to 1874 the City (then the town) of Windsor, presumably acting under the Municipal Act in that regard, had at an expense of \$100,000, established waterworks for the supply of water to the inhabitants of the town for domestic and fire purposes; and, for defraying in part the expense of establishing such waterworks, had, by by-law approved of by the ratepayers, provided for the issue of debentures to the amount of \$40,000.

In 1874 the town applied to the Legislature for an Act to provide for the better working, management and extension of the said waterworks, and to confirm the by-law, and thereupon the Act, 37 Vict. ch. 79 (O.), was passed. By it provision is made for the creation of a body to be called "Water Commissioners of the Town of Windsor," composed of three members, of whom the mayor is to be one, the other two to be elected by the ratepayers qualified to vote for councillors, as provided in the 38th and following sections, they and their successors to be a body corporate under the above name, and to have all the powers necessary to enable them to manage the then established system of waterworks and to extend the same, and to construct new or additional ones, and to carry out all and every the other powers conferred upon them by this Act (secs. 2 and 38.) My brother Osler has referred to the principal provisions of this Act, and I will only refer to a few additional sections.

By sec. 9 the commissioners are required to keep regular books of account, and records of their proceedings, and to report annually to the Corporation of Windsor on the condition of the works, and to furnish a statement of their receipts and expenditures.

The commissioners are empowered from time to time to make and enforce all necessary by-laws, rules and regulations for the general maintenance or the management and conduct of the waterworks' officers and others employed by them, and for the collection of the water rates or rent, and fixing the times of payment, and for the enforcement of payment in case of default, and, with the consent of the

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Corporation of Windsor, to employ the town collectors, assessors, and such other persons as in their opinion are necessary, to carry out the objects of the Act, and specify their duties and fix their compensation, and the commissioners and their officers are to have the like protection in the exercise of their respective offices and the execution of their duties as justices of the peace (secs. 14, 16 and 17.) There are other provisions relating to the powers and duties of the commissioners, but they all point in the same direction, viz.: the assumption by the commissioners of the then existing system, and the acquisition or construction of further or extended systems to be vested in the Corporation of Windsor. That this was the scheme and general intent of the Act is further emphasized by the 45th section.

It is to be observed that the commissioners are not provided with funds beyond those which are derived from the collection of water rates and rents, and as to these they are required to account to the corporation, and to pay over to the treasurer quarterly the balance after providing for the expenses of maintenance of the works.

The funds required for the purpose of acquiring the necessary lands, rights and privileges for the extension and repairs of the waterworks, or for the purpose of meeting the payment of any other matter or thing contemplated or allowed by the Act, are to be provided by the Corporation of Windsor.

For this purpose the Act of 1874 empowers it to issue debentures of the town, to be called "waterworks debentures," for a sum not exceeding \$300,000, to be payable within a period of thirty years from the date of the respective issues thereof, and to raise by rate imposed for that purpose such sums as may be necessary to pay the interest upon, and provide a sinking fund to meet, the principal as it falls due, subject to the limitation that every by-law for raising upon the credit of the municipality any money additional to that already raised for waterworks

purposes, must, before its final passing, receive the assent of the electors, except that the council may raise by by-law or by-laws without submitting the same for the assent of the electors any sum not exceeding in one year \$30,000 for waterworks purposes (sec. 33). By the Act 57 Vict. ch. 87 (O.), the sum to be so raised is reduced to \$20,000 per annum.

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The proceeds of debentures so issued are to be paid into some chartered bank and kept separate from any other funds of the town, and are only to be paid out on the cheque of the mayor and treasurer and the chairman of the commissioners, and applied for the payment and discharge of the liabilities incurred in carrying out the improvements contemplated by the Act, and of interest on the debentures during the period of erection and completion of the works with the proviso that nothing therein contained is to prevent the commissioners, should they deem it advisable to do so, from paying the contractor or contractors or others in debentures either at par, or at a rate of discount, as deemed advisable by the commissioners, with the assent of the Corporation of Windsor, nor from selling or negotiating the same as to them may seem most expedient and advantageous to the interests of the Corporation of Windsor (sec. 34). All work under the commissioners is to be performed by contract (sec. 42).

The Act taken as a whole shews that while the extensive powers with which the commissioners are invested undoubtedly include the power to contract and be contracted with, yet that that power must, in relation to extensions or improvements involving anything more than incidental maintenance, be subject to certain limitations pointed out by the Act, which deal with the mode of raising or procuring the funds for those purposes. And in the first place there must remain to be issued under 37 Vict. ch. 79 (O.) debentures of an amount sufficient to cover the amount of the contract or contracts for the proposed extension or improvement, and secondly, there must have been a by-law

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of the Corporation of Windsor providing for the issue of such debentures, and fixing and imposing the rate necessary to pay the interest upon, and provide a sinking fund to meet, the principal, and thirdly, the debentures must have been issued so as to enable the commissioners to have recourse to them or their proceeds for payment of the contractors.

It has not been, and I apprehend could not be, questioned that the proposed work was an extension or improvement, and not a work of mere maintenance or repair. The evidence establishes that on the 7th of November, 1896, the limit of \$300,000 was within \$18,716 of being exhausted, and no by-law providing for the issue of the unissued balance or of any other amount had been passed, nor had debentures been issued in accordance with the Act.

Of these facts the plaintiffs were aware before entering into the contract, and they are not in a position to assert estoppel against the defendants, even if the doctrine is available against such a corporation. See *Peterborough and Victoria v. Grand Trunk R.W. Co.* (1859), 18 U.C.R. 220; *McKillop v. Logan* (1899), 29 S.C.R. 702.

I think the Commissioners had no authority to make the contract at the time and under the circumstances appearing. The ultimate liability to meet the payments for the proposed work would fall upon the Corporation of Windsor, but the Commissioners had no power to impose that liability save under the conditions prescribed by the statute governing their creation and powers.

These not having been fulfilled, the plaintiffs are not in a position to rely upon the action of the Commissioners as a valid contract: Brice on *Ultra Vires*, 3rd ed., pp. 38, 39, and cases there cited.

For these reasons I think the appeal should be allowed, and the action dismissed with costs, including the costs of the proceedings subsequent to the first judgment.

Judgment.

MOSS, J.A.

MACLENNAN, and LISTER, JJ.A., concurred.\*

*Appeal allowed.*

R. S. C.

\* BURTON, C.J.O., having resigned more than six weeks before the delivery of the judgment, took no part.—REP.

### CRAIG V. CROMWELL.

*Lien—Mechanics' Lien—“Notice in writing of such lien”—Letter—R.S.O. ch. 153, sec. 11, sub-sec. 2.*

A letter to the owner from sub-contractors furnishing materials, asking him when making a payment to the contractor for the building in question to “see that a cheque for at least \$400 is made payable to us on account of brick delivered, as our account is considerably over \$700, and we shall be obliged to register a lien if a payment is not made to-day” is sufficient “notice in writing” of a lien under the Mechanics' Lien Act, R.S.O. ch. 153, sec. 11, sub-sec. 2. Judgment of a Divisional Court, 32 O.R. 27, affirmed.

APPEAL by the defendant from the judgment of a Divisional Court [BOYD, C., ROBERTSON, and MEREDITH, JJ.], reported 32 O.R. 27.

Statement.

The question involved was whether the following letter to the owner from the claimants of a lien was a sufficient “notice in writing of such lien” under sub-section 2 of section 11 of R.S.O. ch. 153 :—

“When you are making a payment to-day to Mr. Hayner, on the Lisgar Street buildings, kindly see that a cheque for at least \$400 is made payable to us on account of brick delivered, as our account is considerably over \$700, and we shall be obliged to register a lien if a payment is not made to-day.”



## Argument.

The appeal was argued before ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 17th of September, 1900.

*Arnoldi*, Q.C., for the appellant. The letter is not sufficient notice within the sub-section. The notice ought to be as definite in essentials as a formal claim of lien for registration, and the form given in the Act furnishes a fair test of what is required. A mere general notice putting the owner upon inquiry is not enough; there must be "notice in writing of such lien," which necessarily means that the writing must contain all the particulars which would enable the recipient to decide that, if the facts are truly stated, the lien exists. This letter gives no particulars of the debt, or the relationship of the writers to Hayner, and does not describe the property in question. A notice under the sub-section is far reaching in its effects, and a loose, informal letter of this kind should not be held to be sufficient. The notice referred to is, moreover, one to be given by the claimant to the person paying to his immediate contractor, and not, as in this case, to the owner, with whom the claimant and his immediate contractor have no privity. At the least, there must be notice to the paymaster of the immediate contractor as well as to the owner.

*Thomson*, Q.C., for the respondent. Evidently what the sub-section contemplates is not an elaborately prepared legal document, but an informal intimation in reasonably plain terms that a lien is claimed. This appears not only from the wording of the sub-section, but also from the history of the legislation. By the Act of 1873 only the contractor had a lien, but by giving to the owner notice—not necessarily in writing—a sub-contractor could intercept payments. The safeguard of writing was afterwards added, but evidently it was not intended that new and special formalities should be observed. It would be most unreasonable to insist on the same particulars being given as in a claim for registration. That is intended to warn strangers dealing with the property that there are un-

satisfied claims, and necessarily there must be minute, definite information; while the notice now in question is given to the owner, who has a general knowledge of all the facts, and is intended to warn him that the person giving it is looking to the statutory fund for payment, and to give him an opportunity of protecting himself. Notice to the person contracting with the claimant, or to that person's paymaster, is unnecessary; there is always liability there. Notice to the owner, whose land is sought to be reached, is what is needed, and that notice has been given here.

*Arnoldi*, in reply.

November 13th, 1900. ARMOUR, C.J.O.:—

The judgment appealed from is, in my opinion, right, and should be affirmed.

The notice given by the Ottawa Brick Manufacturing Company to Cromwell was sufficient, in my opinion, to give him reasonably to understand that they claimed a lien for the bricks supplied by them, and so was a sufficient notice of such lien within the provisions of the statute, and Cromwell was the proper party to receive such notice.

The appeal will, therefore, be dismissed with costs.

OSLER, J.A.:—

I am of opinion that the notice was sufficient. The object of the notice is to warn the owner that he cannot safely make payments on account of the contract price, even within the 80 per cent. margin, because of the existence of liens of which he was not otherwise bound to inform himself or to look for. The notice does not compel him to pay the lien. It does not prove the existence of the lien. Its sole purpose is to stay the hand of the paymaster until he shall be satisfied—either by the direction of the debtor or of the Court, in case proceedings to realize the lien are taken—that there is a lien, and that some

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OSLER, J.A.

amount is really due and owing to the lien-holder. Section 12 would appear to authorize him to pay the sub-contractor, but if he does so he assumes the risk of being able to prove, as between himself and the contractor, that the debt was justly due, and his right or power to pay the sub-contractor does not depend upon notice having been given to him under section 11, sub-section 2. If the notice were the foundation of a proceeding against the owner, or if it laid him under an obligation to deal with or satisfy the party giving it, it might be urged with some reason that it should convey not less information and with as much detail as is required by section 17 for the purpose of registration, where a formal proceeding is prescribed. The notice under section 11, sub-section 2, is purely informal, and was manifestly intended to be so, no form or special particulars of detail being prescribed, in regard that it might have to be given promptly, or by illiterate persons, who might, as it were, read and understand the sections as they ran. Without deciding what is the minimum of information that such a notice should contain, or how far it should be read in the light of surrounding circumstances known to both parties, we can see that this notice informs the owner, assuming him to be a person of ordinary intelligence: (1) of the buildings for which the materials were supplied; (2) of the persons who supplied them and who make the claim; (3) of the name of one of the original contractors to whom it would seem that the defendant was about to make a payment on account; (4) of the minimum sum claimed in respect of such materials, which the defendant is to have regard to in making his payments; and (5) that the claimants have a lien, which they will register if a payment on account is not made that day. It may be that if the notice were to be read as pleadings, civil and criminal, were read fifty years ago, fatal defects might be picked out in it. But it is not intended to be the subject of subtle criticisms and trifling objections. If it is such a notice as,

reasonably read, ought to convey to a reasonably intelligent man the information which I have shewn that this notice does convey, it conveys all that the statute requires. It has been said that though no form is prescribed by subsection 2, yet that as section 49 enacts that the forms mentioned in the schedule, or forms similar thereto, or to the like effect, may be adopted "in all proceedings" under the Act, the claimants should have tried to select and fit some form to the case. Perhaps a prudent lawyer could have done so, but it appears to me that the "proceedings" referred to in section 49 are proceedings connected with the realization of the lien, and do not include the plain informal notice required by section 11 (2).

I refer to *Spice v. Bacon* (1877), 2 Ex. D. 463; *Northcote v. Bruncker* (1887), 14 A.R. 364; *Gemmill v. Garland* (1886), 12 O.R. 139; *Truax v. Dixon* (1889), 17 O.R. 366.

I cannot say that I have been able to entertain any doubt that the judgment of the majority of the Court below is right. The appeal must, therefore, be dismissed with costs.

MACLENNAN, MOSS, and LISTER, JJ.A., concurred.

*Appeal dismissed.*

R. S. C.

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Judgment.

OSLER, J.A.



## BANK OF HAMILTON V. IMPERIAL BANK.

*Bills of Exchange and Promissory Notes—Cheque—Marking by Bank—Alteration—Forgery—Banks and Banking—Clearing House.*

A customer having a deposit account with the plaintiff bank drew a cheque upon that bank payable to cash or bearer for five dollars and had it "marked" by the ledger-keeper. He then altered it so as to make it apparently a cheque for five hundred dollars, it being in such form as to enable this to be done readily, and then deposited it with the defendant bank, obtaining from them by his cheques upon them the sum of five hundred dollars. The following day the defendant bank sent the cheque to the Clearing House in the usual course of business and there in adjusting the balances it was charged against the plaintiff bank as a cheque for five hundred dollars. On the next morning, when in the usual course of banking business at the place in question, the "marked" cheques received on the previous day from the Clearing House were being checked with the deposit ledger, the alteration was discovered and the plaintiff bank at once gave notice to the defendant bank and demanded payment of four hundred and ninety-five dollars :—

*Held*, that the alteration of the cheque by the drawer after it had been "marked" was forgery ; that the plaintiff bank was not responsible on the ground of negligence for the subsequent fraud of the drawer ; that even if the adjustment of the balances in the Clearing House constituted payment of the cheque, the notice given on the following day before the defendant bank altered its position or lost any recourse against other parties was in time, and that therefore the plaintiff bank was entitled to recover.

*London and River Plate Bank v. Bank of Liverpool*, [1896] 1 Q.B. 7, considered.

Judgment of MACMAHON, J., 31 O.R. 100, affirmed, ARMOUR, C.J.O., dissenting.

## Statement.

AN appeal by the defendants from the judgment of MACMAHON, J., reported 31 O.R. 100, was argued before ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 17th and 18th of September, 1900. An outline of the facts is given in the headnote, and they are stated fully in the report below.

*Lash*, Q.C., and *George Kappele*, for the appellants. When the cheque was altered by Bauer after it had been marked it became a new and valid unmarked cheque for the increased amount, and subject to the rules of law applicable to such an instrument. The defendants took it in good faith, presented it in due course, obtained payment of it from the drawees, and are not liable to refund. The

process of adjusting the balances in the Clearing House does not affect the question ; the case must be treated just as if a private holder had presented the cheque to the plaintiffs for payment and had received the money. Under such circumstances it would be idle to contend that the plaintiffs could recover back the money, and the position now is the same. There has been payment ; that payment estops the plaintiffs from denying the genuineness of the instrument ; and is fatal to their claim. At the very least the demand for repayment should have been made on the day of payment, and the possibility of prejudice to the payees is an absolute bar : *London and River Plate Bank v. Bank of Liverpool*, [1896] 1 Q.B. 7. The fraud resulted from the plaintiffs' carelessness and they should suffer and not the innocent holders.

*W. M. Douglas*, and *A. M. Stewart*, for the respondents. The appellants' argument proceeds upon two palpable fallacies. In the first place there was no payment within the meaning of the authorities ; there was merely a partial adjustment of balances and the objection was taken while the right to object was still open. In the next place this was not a cheque at all for the larger amount ; after the alteration, which clearly constituted forgery, it was a mere worthless piece of paper, and the plaintiffs are entitled to recover back the money paid as upon a failure of consideration. Even if the adjustment of balances in the clearing house is, technically speaking, payment, the plaintiffs should succeed, for payment in itself does not operate as a bar to recovery, but only payment followed by some change in the position of the payee, and here the defendants have lost no remedy and are not prejudiced. The "marking" was not equivalent to acceptance, and even if it were the plaintiffs are not responsible for the subsequent fraud : *Scholfield v. Earl of Londesborough*, [1896] A.C. 514.

*Lash*, in reply.

Judgment.

November 13th, 1900. OSLER, J.A.:—

OSLER, J.A.

I am of opinion that the decision of my learned brother MacMahon is right, and that the judgment for the plaintiffs should be affirmed. I wish to decide nothing more than the facts proved call for. These are: That the plaintiff bank certified a cheque drawn upon them by their customer Bauer for the sum of five dollars, payable to cash or bearer; that Bauer then fraudulently altered the cheque so as to make it appear to be a certified cheque for five hundred dollars, and presented it, so altered, to the defendants, who, in effect, paid him five hundred dollars therefor. On the following day, the 27th of January, 1897, the cheque was presented for payment or settlement by the defendant bank to the plaintiff bank in the Clearing House and was then, as the effect of the transactions which there took place, paid by the plaintiffs as a cheque for five hundred dollars. On the next morning the forgery was discovered by the plaintiffs and repayment of the amount which they had so paid in error was forthwith demanded from the defendant bank. These, I think, are the only facts necessary to be mentioned.

The case is not complicated by any question of negligence on the part of the plaintiffs in certifying Bauer's cheque in the shape in which he drew and presented it. It was contended that they had by doing so given him the opportunity of making the fraudulent alteration. It may be that the bank could have charged Bauer's account with it had the fraudulent alteration been made by some one to whom Bauer had transferred it, and his account had been large enough to meet it: *Young v. Grote* (1827), 4 Bing. 253; *Union Credit Bank v. Mersey Docks and Harbour Board*, [1899] 2 Q.B. at p. 211.

*Scholfield v. Earl of Londesborough*, [1896] A.C. 514, however, decides that the acceptor of a bill of exchange is not under a duty to take precautions against fraudulent alterations in a bill after acceptance, and

Judgment.

OSLER, J.A.

equally I think his omission to do so cannot, in itself, be an answer to the acceptor's demand for restitution where he has paid the bill in ignorance of the forgery. Such a demand is one for the repayment of money paid under a mistake of fact, and without consideration, and, while it may be conceded that it is in principle a demand of an equitable nature, and may, therefore, be met and resisted on equitable grounds, these must be grounds arising in or out of or subsequent to the transaction of payment itself and not out of facts which did not conduce or lead to the payment. Whether in point of law, looking at the form of the certification, the plaintiffs are to be regarded as acceptors of the cheque or not their legal position as regards their right to maintain the action is the same as if they were, because they paid the cheque on the faith of the supposed certification.

The defendants urged that the alteration of the cheque was not forgery; that the certification, so to call it, was not part of the cheque; that it was still Bauer's genuine cheque for five hundred dollars; and that what took place was no more than if knowingly or by mistake the plaintiffs had simply allowed him to overdraw his account. This seems to me, with all respect, to be an argument of desperation. Assuming that what the plaintiffs placed upon the cheque is not to be regarded as an acceptance, yet if its effect is, as the Judicial Committee say in *Gaden v. Newfoundland Savings Bank*, [1899] A.C. 281, 285, "to give the cheque additional currency by shewing on the face that it is drawn in good faith on funds sufficient to meet its payment, and by adding to the credit of the drawer that of the bank on which it is drawn," it is clear that its alteration by the drawer after certification is forgery within the Criminal Code.

The question then is whether the plaintiffs having paid it by mistake, as they undoubtedly did, are entitled to reclaim the sum paid less the amount for which the cheque was in truth certified.



Judgment.

OSLER, J.A.

The defendants insist that there is an absolute rule which prevents them from doing so unless at the least they have given notice and demanded repayment on the same day as that on which they paid the forged instrument, and that as in the present case the forgery was not discovered and notice given until the following morning, the plaintiffs must fail. I cannot, however, say that I am satisfied that this is the law. Although in the present state of the authorities I speak with diffidence, it seems to me that the plaintiffs' right to recover depends upon this: whether by their neglect or delay in giving notice—it may be, under some circumstances, even on the same day—the position of the party who has received the money has been, or may have been, altered. Great reliance was placed on the observation of Bayley, J., in the well-known case of *Cocks v. Masterman* (1829), 9 B. & C. 902, 908, that the holder of a bill is entitled to know on the day when it becomes due whether it is an honoured or dishonoured bill. But in my humble judgment this must be read with reference to the facts of that case, of which the important one was that there being endorsers on the bill the holder was by the omission of the acceptor to give notice of the forgery until the following day deprived of the right which he would otherwise have had of proceeding against the endorsers on the same day as that on which the payment in error had been made. The holder, indeed, says the learned Judge, is not bound by law, if the bill be dishonoured by the acceptor, to take any steps against the other parties to the bill till the day after it is dishonoured. But he is entitled to do so if he thinks fit.

The principle acted upon in that and in other cases such as *Mather v. Lord Maidstone* (1856), 18 C.B. 273, seems to be that by the delay to give notice of the forgery the remedy of the holder against the other parties may have been prejudiced.

I cannot see wherein a case like the present, where the defendant bank's recourse is against the maker or drawer

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OSLER, J.A.

of the cheque alone, differs, or why it should differ, in principle from the ordinary one of the recovery back of money which has been paid by mistake: *Durrant v. Ecclesiastical Commissioners* (1880), 6 Q.B.D. 234. There can be no ground in such case for invoking the application of the arbitrary doctrine of commercial necessity in favour of negotiability. Some dicta are found in the recent case of *London and River Plate Bank v. Bank of Liverpool*, [1896] 1 Q.B. 7, *coram* Mathew, J., which were unnecessary for the decision of the case and which appear to carry the doctrine of the non-liability of the party receiving the money much further than it has yet been carried, but until these dicta shall have received the approval of a higher court, I am, with all respect, unable to follow them. I refer to the judgment of Patterson, J.A., in *Ryan v. Bank of Montreal* (1887), 14 A.R. 533, 546; *White v. Continental and National Bank* (1876), 64 N.Y. 316, and cases there cited; Daniel on Negotiable Instruments, 4th ed., sec. 1661, and cases there cited. In the case before us no one has been able to suggest how the remedy of the defendants against their fraudulent customer on the cheque they cashed for him has been affected or their position altered for the worse by the non-discovery of the forgery until the morning following the payment. I am, therefore, of opinion that the appeal should be dismissed.

MOSS, J.A. :—

Although the amount claimed in this action is comparatively small the question involved is one of importance to bankers and business men. It is, besides, one of those unfortunate cases in which it happens that whichever way the decision turns one of two innocent parties must suffer.

The question is as between them which should bear the loss.

It is not claimed on behalf of the defendant bank that the stamping and initialing of the cheque in question was

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MOSS, J.A.

an acceptance by the plaintiff bank in accordance with the provisions of the Bills of Exchange Act so as to render it liable on the instrument. Indeed, the contrary was strongly contended on the argument of the appeal.

The effect of the certifying was only to shew on the face that it was drawn in good faith on funds sufficient to meet its payment: *Gaden v. Newfoundland Savings Bank*, [1899] A.C. 281.

When the ledger-keeper of the plaintiff bank certified the cheque it truly represented the facts then appearing upon its face, viz., that it was drawn for five dollars, and that there were to the drawer's credit funds sufficient to meet that sum. Before it again reached the plaintiff bank it had been fraudulently altered so as to represent a very different state of facts, and that happened without negligence with which the plaintiff bank could be charged.

The cheque reached the plaintiff bank again through the medium of the Clearing House, and if the fraud had been discovered in time, it would, no doubt, have been made an item of return through the Clearing House, and the defendant bank would, under the rules of that institution, have been then obliged to pay the amount immediately, on demand of the plaintiff bank. And such payment might have been enforced through the manager of the Clearing House if notice could have been given to him before 12 o'clock noon of the same day.

The failure to make the return and demand as prescribed does not, however, deprive the plaintiff bank of any right it might have otherwise than under the rules to return or object to any item. Any such right is expressly saved by subsequent rule.

The reason why the fraud was not discovered on the day the cheque reached the plaintiff bank through the Clearing House was that, pursuing the usual course adopted by the plaintiff bank, and I suppose, by all the other members of the Clearing House, the officials whose duty it was to examine the items received through the Clearing

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MOSS, J.A.

House seeing that the cheque appeared on its face to be drawn upon the plaintiff bank by a customer and to be certified by the ledger-keeper did not refer to the customer's account until the next morning.

The fraud was discovered early the next morning and notice was at once given to the defendant bank and repayment demanded. There can be no question of negligence in not discovering the fraud earlier. The plaintiff bank was justified in assuming that since the cheque left the hands of the ledger-keeper no crime had been committed by the drawer or any holder.

There was nothing in the appearance of the instrument as returned to give rise to any suspicion of that kind, and it might fairly be presumed that it was an honest cheque in all particulars. It came back to the plaintiff bank in regular and ordinary course through the Clearing House and was dealt with precisely as all other certified cheques of its customers were dealt with. It came in the shape of a representation to the plaintiff bank that it had certified that it held funds of the drawer sufficient to answer a demand for five hundred dollars. Accepting that as a true representation the plaintiff bank was surprised into treating the cheque as a valid instrument of the value of five hundred dollars to it in the exchanges effected in the Clearing House.

Treating the transaction as operating in the result as a payment by the plaintiff bank to the defendant bank of the amount appearing on the face of the cheque it appears that the plaintiff bank paid a sum for which it was not liable upon the instrument or otherwise, and for which it received no consideration.

Apart from any technical rule there may be relative to commercial instruments, there appears no good reason why the sum so paid should not be recovered back.

Has the defendant bank a better equity to retain the money so obtained than the plaintiff bank has to recover it back? It is true the defendant bank received the cheque in



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MOSS, J.A.

good faith from Bauer and gave him credit for the amount of it. But in doing so it did not become the absolute purchaser of the cheque nor agree to look to the plaintiff bank alone for payment of the amount. It accepted the cheque as agent for Bauer to collect it, and when collected to give him credit for the proceeds. In the meantime it chose to honour his cheques drawn against the amount. In doing so the defendants had no better justification for believing that the cheque was what it was represented to be by Bauer than the plaintiff bank had for believing that when the cheque was returned to it it would be returned in the same condition it was in when certified.

When the cheque was offered to the defendant bank it would have been as easy for it to have ascertained from the plaintiff bank whether it was a genuinely certified cheque for five hundred dollars as it would have been for the plaintiff bank to have checked it by reference to Bauer's account when it came from the Clearing House. Both relied upon the presumption of honest dealing, and neither supposed that a crime would be or had been committed. The defendant bank knew that the cheque had been certified at Bauer's instance, and becoming the holder under such circumstances it was really in no better position than the holder of an uncertified cheque. See *Daniel on Negotiable Instruments*, 4th ed., sec. 1605.

There appears to me to be nothing in this case to give the defendant bank a higher equity to retain the amount received in respect of this cheque than the plaintiff bank has to recover it back as money paid under a mistake and without consideration.

But it was argued on behalf of the defendant bank that this cheque being a bill of exchange, and having been actually paid to an innocent holder for value, the amount so paid cannot be recovered back.

This argument is rested upon what was said rather than what was decided by Mathew, J., in *London and River Plate Bank v. Bank of Liverpool*, [1896] 1 Q.B. 7.

Judgment.

MOSS, J.A.

With the actual decision in that case there may be no ground for dispute, but the facts of that case do not at all correspond with the facts of this.

In that case months had elapsed after the payment to the Bank of Liverpool of the bill, and in the meantime the bank had lost its right of giving notice to parties to the bill who were liable in the event of nonpayment that it had not been paid. It was plain that the Bank of Liverpool had, when the action was commenced, a better equity to retain than the plaintiffs had to recover back the amount paid. Through the long lapse of time the bank had lost its remedies upon the instrument against other parties liable thereon.

In *Cocks v. Masterman* (1829), 9 B. & C. 902, the real reason for the decision is stated by Bayley, J., in the last sentence of his opinion. He says: "If we were to hold that the plaintiffs were entitled to recover, it would be in effect saying that the plaintiffs might deprive the holder of a bill of his right to take steps against the parties to the bill on the day when it becomes due."

In that case as in *London and River Plate Bank v. Bank of Liverpool*, there were parties to the bill who were entitled to notice of dishonour, and as to whom failure to give such notice discharged them from liability.

In *Leeds Bank v. Walker* (1883), 11 Q.B.D., at p. 89, Denman, J., speaking of *Cocks v. Masterman*, said it was decided solely on the ground that the neglect to give notice of the forgery on the day on which the bill became due might deprive the holder of his right to take steps against the parties to the bill on the day on which it became due, and he pointed out that this was a ground wholly inapplicable to the case with which he was dealing, viz., a Bank of England note on which the bank alone was liable if any one was. That is to say, the prejudice suffered must arise out of a deprivation of some right or remedy against other parties upon the instrument itself.

Judgment.

MOSS, J.A.

In the present case the only person liable on the cheque was the drawer, by whose fraudulent act it had been altered, and who would certainly not be discharged by want of notice on the day of presentation or at any time.

The only duty it can be said the plaintiff bank owed the defendant bank was not to be negligent, and there was no breach of that duty.

The plaintiff bank was not negligent in certifying the cheque in the form on which it was when presented by Bauer, nor in not discovering the subsequent fraud immediately upon the cheque coming to it through the Clearing House, and as soon as in the usual and ordinary course of business the fraud was discovered there was no delay in notifying the defendant bank and demanding repayment.

In my judgment the rule that was applied in *London and River Plate Bank v. Bank of Liverpool* ought not to be applied in the circumstances of this case.

I think the appeal ought to be dismissed.

MACLENNAN, and LISTER, JJ.A., concurred.

ARMOUR, C.J.O. :—

In my opinion this case is governed by the rule laid down in *Cocks v. Masterman* (1829), 9 B. & C. 902, where it is said: "But we are all of opinion that the holder of a bill is entitled to know, on the day when it becomes due, whether it is an honoured or dishonoured bill, and that, if he receive the money and is suffered to retain it during the whole of that day, the parties who paid it cannot recover it back."

This rule, rigorous though it may seem, has been adhered to in England ever since: see *Mather v. Lord Maidstone* (1856), 18 C.B. 273; *Durrant v. Ecclesiastical Commissioners* (1880), 6 Q.B.D. 234; *Leeds Bank v. Walker* (1883), 11 Q.B.D. 84; *London and River Plate*

*Bank v. Bank of Liverpool*, [1896] 1 Q.B. 7; Byles on Bills, 16th ed., p. 353.

Judgment.

ARMOUR, C.J.O.

The application of this rule does not at all depend upon whether the holder of the bill is or is not in fact prejudiced by the delay, for the conclusion of law is that he may be prejudiced and this is the reason of the rule.

In this case the defendants, the holders in due course of the cheque, presented it to the plaintiffs on the 27th of January through the Clearing House, and it being due on presentation the defendants were entitled to know on that day whether it was honoured or dishonoured.

The plaintiffs paid the cheque through the Clearing House on that day, but this payment was, in my opinion, conditional upon their right to dishonour the cheque during that day, but not having dishonoured the cheque during that day such payment became absolute, and the defendants having received the money for the cheque from the plaintiffs and being suffered to retain it during the whole of that day the plaintiffs cannot recover it back.

It was shewn that it was the habit of the plaintiffs and some other banks not to compare their accepted cheques with the entries in their ledgers until the day after they received them from the Clearing House, but this habit could not avail to deprive the defendants of their legal right to know on the day when this cheque was received by the plaintiffs from the Clearing House whether it was honoured or dishonoured.

And there was no sufficient reason shewn for their not comparing their accepted cheques with the entries in their ledgers on the day they received them from the Clearing House.

In my opinion the appeal should be allowed with costs and the action dismissed with costs.

*Appeal dismissed*, ARMOUR, C.J.O., *dissenting*.

R. S. C.



## ASH V. METHODIST CHURCH.

*Church—Expulsion of Minister—Domestic Forum.*

The Court cannot interfere with the action taken by the duly constituted tribunals of a church in expelling a minister, when these tribunals have proceeded in accordance with the rules, regulations and discipline of the church, and the accused has had the opportunity of defending himself.

Judgment of MEREDITH, J., affirmed.

## Statement.

APPEAL by the plaintiff from the judgment at the trial.

The plaintiff, who had been for many years a minister in the defendant church, brought the action for a declaration that he had been illegally expelled from the ministry, and for a mandamus to compel the defendants to reinstate him. The decision of the question depended upon the validity of proceedings taken in the church courts, and the details as to these are given in the judgment.

The action was tried at Cobourg, on the 7th of November, 1899, before MEREDITH, J., and was dismissed, and the appeal was argued before MACLENNAN, MOSS, and LISTER, JJ.A., on the 22nd, 23rd, and 26th of March, 1900.

*Riddell*, Q.C., and *A. A. Abbott*, for the appellant.

*Maclaren*, Q.C., for respondents.

The argument turned almost entirely upon the application and effect of the rules and discipline of the defendant church, referred to in the judgment. Upon the general question of the procedure to be observed by a domestic tribunal in a case of this kind, and the cause for expulsion, Counsel referred to *Leach's Club Law*, p. 24; *Gardner v. Fremantle* (1870), 19 W.R. 256; *Mulroy v. Supreme Lodge* (1888), 28 Mo. Ap. 463; *Wertheimer on Clubs*, 2nd ed., p. 68 *et seq*; *Pulford v. Fire Department* (1875), 31 Mich. 458; *People v. Medical Society* (1865), 32 N.Y. 187; *Hopkinson v. Marquis of Exeter* (1867), L.R. 5 Eq. 63; *Dawkins v. Antrobus* (1881), 17 Ch. D. 615; *Guinane v. Sunnyside Boating Co.* (1893), 21 A.R. 49;

*Regina v. Governors of Darlington Free Grammar School*  
(1843), 12 L.J.Q.B. 124.

Judgment.

MACLENNAN  
J.A.

November 13th, 1900. The judgment of the Court was delivered by

MACLENNAN, J.A.:—

The plaintiff had been for many years a minister of the Methodist Church, and on the 1st of June, 1898, the Conference to which he belonged passed a resolution *locating* him. He alleges in his statement of claim that by the rules, regulations and discipline of the church, the effect of locating a member is to deprive him of his rights and privileges as such, and to expel him from the ministry. The object of the action is to set aside the resolution of the Conference as having been passed illegally, and contrary to the rules, regulations and discipline of the church.

The action was tried before Mr. Justice Meredith, who dismissed it, and this appeal is from his judgment.

The ministers and members of the Methodist Church are incorporated by that name, by an Act of the Dominion Parliament, 47 Vict. ch. 106, and the matters involved in the action are subject to the jurisdiction of an annual conference, composed of the ministers within a limited area, and an equal number of laymen, elected thereto as provided by a code of laws called the Discipline of the Church. According to the discipline, certain defined matters are considered and disposed of in joint session of both ministers and laymen; but matters affecting the character and qualifications of ministers, are enquired into and disposed of, in what are called ministerial sessions, that is meetings composed of ministers only: secs. 114 and 115. Section 109 provides for a Court of Appeal with power to hear and determine appeals, sub.-sec. 3 (c), "from decisions of annual conferences when they have exceeded their jurisdiction."

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J.A.

By sec. 116: "When a minister is so unacceptable, inefficient or secular, as to be no longer useful in his work, the annual conference may request him to ask a location, and if he refuses to comply, the conference shall bear with him till the next session ensuing, at which time, if he persist in his refusal, the conference may, without his formal trial, locate him, without his consent, by a vote of two-thirds of those present and voting; a minister who is located, and who has rendered less than twenty-three years' service, thereby ceases to be a member of the superannuation or supernumerary ministers' fund, but he shall have his annual subscriptions refunded, with six per cent. simple interest."

By sec. 118 (4): "Ministers who withdraw from connection with an annual conference, and ministers who are located by the action of an annual conference, shall not exercise the functions of the ministry of our church; but may, should they desire it, be considered as local preachers, and shall be subject to all the regulations affecting local preachers, and if charged with immorality, shall be proceeded against as other local preachers, and the superintendent of the circuit, or mission, shall refer the case to the annual district meeting."

It should be explained that each conference area is subdivided into districts, and the ministers of each district, with an equal number of laymen, hold annual district meetings, similar to the annual conferences, with joint and ministerial sessions. By sec. 143 the ministers of the district, in special session, are required to examine the character and qualifications of all ministers, and probationers for the ministry, belonging to the district, in accordance with the discipline, and by sec. 144 their proceedings are to be recorded and forwarded to the annual conference, so that every district meeting is required, annually, to report to the conference upon the moral and religious character and conduct of every member within its bounds, and upon his fitness for his work, and his efficiency in its performance, sec. 145.

The circumstances out of which the action has arisen began in the year 1893. On the 13th of November, in that year, a committee composed of six ministers of the Lindsay district, within which the plaintiff was a minister, met to investigate certain charges of immorality made against him; and after hearing the evidence of the complainant, and of the plaintiff, unanimously found him guilty of four several acts of immorality, committed in the previous month of September; and by their report the committee declared him to be suspended until the next annual conference should finally dispose of the case. On the 7th of June, 1894, this report of the district committee was dealt with by the Conference, the plaintiff being present, and after hearing him, it was resolved that he should then be deposed from the ministry and expelled from the membership of the church. The plaintiff appealed against this resolution of the Conference to the Court of Appeal, and on the 15th of September, 1894, that Court delivered the following judgment: "In the case of J. C. Ash, deposed from the ministry and expelled from the church in the Bay of Quinte Conference, appeal was taken against the action of said Conference, in passing said sentence without first pronouncing upon the guilt of the accused. Appeal sustained. The appeal, however, on the ground of irregularities of procedure in the lower courts before the matter came before the annual conference is regarded as *ultra vires* of this Court."

The meaning and effect of this judgment are not very clear, but it must be taken to have annulled the resolution of deposition and expulsion; and it seems to rest the decision upon the ground that the Conference had not expressly adopted the report, or otherwise expressly pronounced upon the guilt of the accused, but had merely resolved to depose and expel him. It seems to say also that the Court expresses no opinion upon certain grounds of irregularity of procedure which had been urged against the report, having no jurisdiction to do so.

Judgment.

MACLENNAN,  
J.A.



Judgment.MACLENNAN,  
J.A.

Whatever the precise meaning and effect of the judgment may be, however, it does not assume to deal with the district committee's report, but leaves it untouched.

Accordingly, the case came up again in the Conference of 1895, when the plaintiff wrote a long letter to the president, dated the 10th of June, admitting that he had "fallen into a lamentable error, and had committed a grievous sin," but denying that "either in act or intention he had gone so far as to commit, or attempt or intend to commit, actual immorality." He also professed deep penitence, and cast himself upon the sympathy of the Conference for the sake of his wife. He asked that in addition to the punishment and deprivation of office which he had already endured, no further penalty should be pronounced upon him beyond the following: (a) That his name in the meantime should not appear in the printed minutes, until the Conference should see fit to restore it, but that it should be retained on the journals from year to year; (b) That he should be left without an appointment from year to year, until such time as the Conference should see fit to recommend him for superannuation or commutation; and he expressly requested to be left without appointment, and promised not to preach, or exercise the functions of a minister, within the jurisdiction of the Methodist Church in Canada, subject to the will of Conference.

The letter also made stipulations respecting his superannuation allowance, and his wife's claims in case she should survive him.

This letter was referred to a committee, which reported on the 11th of June, and recommended that the proposals contained therein should be accepted; and this report was adopted by Conference by a majority of 69 to 40. In the following year, the Conference of June, 1896, (Journal, pp. 341, 353) recorded that the plaintiff was left without a station, as per agreement of 1895.

The next step in the proceedings was in October, 1896, when the plaintiff appealed to the Court of Appeal, against

the resolution of Conference passed in 1895, which had been passed at his earnest request. This step is remarkable, inasmuch as in his letter, already referred to, he says: "I undertake to submit to whatever the Conference may inflict upon me, and not to claim a new trial, and not to complain in any way, or before any tribunal, of any irregularities in the proceedings, or in any of them, which have been had or taken in this matter by the authorities of the church, and not to raise any question as to want of jurisdiction, or as to the proceedings in excess of jurisdiction, or as to the wrongful proceedings within their jurisdiction, of the authorities of the church in this matter, or any of the ministers of the church." The explanation of this appeal, offered by him in his evidence, is that the agreement was only intended to be for a year, an explanation which is inconsistent with the whole language and spirit of his carefully drawn letter. On the 6th of October, 1896, the Court of Appeal sustained the appeal, and the agreement of 1895 was annulled, on the ground that it was "extraneous to disciplinary provisions."

The agreement of 1895 having been thus set aside, the plaintiff's position became, if possible, more difficult than ever. The report of the district committee still stood, undisposed of by Conference; and there was now added to it the confession contained in his letter that he had fallen into a lamentable error and had committed a grievous sin. He had left the Lindsay district, and now resided in the Belleville district. He had been without a station or charge for three years, and his evidence is that his case was generally and publicly known throughout the conference. The stationing committee of 1897 found it impossible to find a station for him; and so sensible was he himself of that difficulty, that he requested of the committee to be left without a station, and it was recorded that he be left without a station at his own request.

In consequence of the action of the Court of Appeal it became necessary for the Conference of 1897 to deal in

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MACLENNAN,  
J.A.

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J.A.

some way with the plaintiff's case. When it came to be considered, the difficulty which was encountered was, that by reason of the agreement of 1895, no question had been made in the Conference of 1896 concerning the plaintiff's character, and it had been passed upon as free from objection, except as dealt with by the agreement, whereas. now that the agreement had been set aside, the question of character had arisen again. The result of discussion and deliberation upon the whole case as it then stood before the Conference was that the following resolutions were adopted :—

“Whereas the Rev. J. C. Ash, a member of this Conference, was tried and convicted on a charge of immorality, and expelled by this Conference in June, 1894; and whereas the said J. C. Ash did appeal to the Court of Appeal against the action of the Conference in his trial and expulsion, and the Court of Appeal allowed his appeal; and whereas the Conference of 1895 did deal with the case of Mr. Ash, by making an agreement with him in which he bound himself not to exercise his ministerial functions; and whereas the District Meeting (Belleville District) of 1896, and the Conference of 1896, did not challenge his character but passed it upon the presumption that the agreement between the Conference and the said J. C. Ash was effective and in force; and whereas the said J. C. Ash did after the Conference of 1896, take an appeal to the Court of Appeal against the action of the Conference of 1895 in making the agreement with him, and the Court of Appeal did allow his appeal against the Conference; and the Conference being of the opinion that we cannot go back of the Conference of 1896 which passed his character, therefore we feel legally compelled to pass the character of the said J. C. Ash, which we now do.

2. That J. C. Ash be and he is hereby requested by this Conference to ask location.”

On the same day, and again, afterwards, on the 5th of June, the plaintiff was formally requested in open Conference to ask for a location, which he declined to do.

Judgment.

MACLENNAN,  
J.A.

At this point, the question arises whether it was competent to the Conference to proceed under sec. 116 and to request the plaintiff to ask a location, on the ground that he was so unacceptable or inefficient as to be no longer useful in his work. It appears to me that having regard to all the antecedent proceedings there can be but one answer to that question. By reason of conduct, which, in his evidence at the trial, he admits to have been "indecent behaviour," which in the letter he admitted to have been "lamentable error" and "grievous sin," and which the committee had found consisted of four several acts of indecency, he had been without a station for nearly four years, and it had been found impossible to find a station for him now. I think it would be very strange if, under those circumstances, it was not competent to the Conference to say that he was so unacceptable, or inefficient, as to be no longer useful in his work. My learned brother was of opinion that it was, and I think he was right.

The resolutions were proposed and discussed and adopted in the presence of the plaintiff, without objection or protest on his part, or of any one on his behalf. If he thought the resolution illegal or irregular or contrary to the rules, regulations and discipline of the church, he was not without means of redress, for an appeal was open to him to the Court of Appeal, and no further step could be taken against him for a year. The plaintiff, however, did not appeal, and not having done so must be taken to have submitted to the resolutions, and to the request made to him in pursuance thereof. If he had brought an action in the High Court to set aside those resolutions, he must have failed on the simple ground that the discipline of the church had provided a tribunal, before which he could obtain relief, if he was entitled to it.

The plaintiff having refused to accept a location when requested, the Conference bore with him until the next session in 1898, when, by a resolution of a majority of the members present and voting, of 98 to 3, he was located, he having declared that he persisted in his refusal.



Judgment.

MACLENNAN,  
J.A.

The proceedings and resolutions of Conference on this occasion were as follows:—

“ In the matter of the Rev. J. C. Ash, a member of this Conference.

Whereas the Rev. J. C. Ash, a member of this Conference, was by this Conference during its session of last year—to wit, on the Second day of June, A.D., 1897—requested to ask for location, as appears by the Journal of the said Conference of the said year, page 368, the resolution being as follows: ‘Moved by S. J. Shorey, seconded by Rev. J. J. Rae, that J. C. Ash be and is hereby requested to ask for location; carried,’

And whereas, the General Superintendent in the chair (Journal, 1443) of the said Conference, did on behalf of the Conference request the said J. C. Ash to ask for location, as appears by the said Journal, page 369, and whereas the President of the said Conference did, during the session thereof—to wit, on the Fifth day of June, A.D. 1897—call the said J. C. Ash before the chair of the Conference and read to him the following: ‘You are hereby notified that by resolution of this Conference you have been requested to ask for location, the Conference requires you to give your answer at once, as the Stationing Committee will meet soon;’

And whereas the said Rev. J. C. Ash in reply refused to comply with the request as appears by said Journal, page 373;

And whereas the Conference has borne with him for one year since the said Conference requested him to ask for location as aforesaid;

And whereas the said Rev. J. C. Ash is still so unacceptable that he is no longer useful in his work;

Therefore it is resolved by this Conference that the said Rev. J. C. Ash be and is hereby located, and that he be notified of the action taken hereby by being served with a copy of this resolution, either personally or by registered letter to his post office address.”

The plaintiff appealed to the Court of Appeal against this resolution, and his appeal was dismissed.

The question whether a minister is unacceptable or inefficient, is peculiarly one for the judgment of conference, and by the discipline that body is made the sole judge on the subject. In the present case they had before them, and upon their records, the grounds upon which they proceeded. The domestic appellate court has declared that their proceedings were regular, and I think the plaintiff has not made out any case for the interference of a court of law.

I think the action was properly dismissed.

*Appeal dismissed.*

R. S. C.

Judgment.

MACLENNAN,  
J.A.

# PEDLOW V. TOWN OF RENFREW.

*Way—Highway—Plan—Dedication—Acceptance—Municipal Corporations.*

The owners of two adjoining lots agreed between themselves to give twenty feet of each lot to form a street, and a plan of sub-division of the lots shewing a street of this width was filed by them, the consent of the municipality being given by resolution. The line fence was then taken down and one owner fenced his land so as to leave twenty feet of the lot open to the public; but the other fenced his so as to leave forty feet. Without any by-law or further resolution the municipality did some grading on the sixty feet, and the sixty feet were used by the public for the purpose of a highway:—

*Held*, that the giving of forty feet by the one owner did not relieve the other owner from his obligation to give twenty feet, and that he could not, after its acceptance by the expenditure of public money upon it and its use by the public, retract the dedication of the twenty foot strip.

Judgment of BOYD, C., 31 O.R. 499, affirmed.

AN appeal by the plaintiff from the judgment of BOYD, C., reported 31 O.R. 499, was argued before ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 18th and 19th of September, 1900. The facts are stated in the judgments.

Statement.

*Aylesworth*, Q.C., and *T. W. McGarry*, for the appellant.

*S. H. Blake*, Q.C., for the respondents.

Judgment.

October 11th, 1900. ARMOUR, C.J.O. :—

ARMOUR, C.J.O.

The judgment of the learned Chancellor is, in my opinion, right and should be affirmed.

The evidence shewed beyond question that the strip of land in dispute was part of the highway agreed to be laid out by Plaunte and O'Brien, the owners of the adjoining lands, each of them agreeing to give for that purpose twenty feet of his land, thus forming a highway forty feet in width between their respective lands.

The land owned by O'Brien opposite to and adjoining that part of Plaunte's land, designated as lot 85 on a plan of Plaunte's property made by one Allen and registered, was a strip of land forty feet in width and extending from the southerly limit of Quarry Street easterly along the front of a parcel of land containing one acre and fifty-six hundredths, conveyed by one Rongier, a predecessor in title of O'Brien, to the Roman Catholic Episcopal Corporation of Pontiac, which conveyance contained the following stipulation: "And the said party of the first part hereby binds himself, his heirs and assigns, to open the road shewn on annexed sketch (marked street privilege) whenever requested to do so by the said party of the second part, but it is hereby expressly understood and agreed to by both contracting parties that said street privilege shall not be used for any other purpose than a street without the mutual consent of the first and second parties to this indenture." And the strip of land owned by O'Brien opposite to and adjoining lot 85 formed part of "the road shewn on annexed sketch marked street privilege."

Plaunte and O'Brien, in pursuance of their agreement, removed the line fence between their respective lands, and Plaunte fenced his land, leaving twenty feet of it, including the strip in dispute, open to the public, and O'Brien did the same, except as to the strip opposite to and adjoining lot 85, forming part of "the road shewn on the annexed sketch marked street privilege," which he left open to the

public to its full width, thus making the highway at that place sixty feet wide.

Judgment.

ARMOUR, C.J.O.

O'Brien was not bound by his agreement with Plaunte to throw open to the public more than twenty feet at this place, and his doing so did not relieve Plaunte from his agreement to throw open to the public twenty feet thereat.

And the only effect of O'Brien throwing open to the public the whole of this part of "the road shewn on annexed sketch marked street privilege" was to debar him from ever consenting that it should be used for any other purpose than a street.

The land so thrown open to the public by Plaunte and O'Brien, and laid out by them for a highway, being only forty feet in width, the consent of the municipality was required to its being laid out of that width: Consolidated Municipal Act, 1892, sec. 545.

On the 2nd of July, 1895, O'Brien presented to the council of the municipality a plan of his property, signed by Plaunte and himself, shewing the highway laid out thereon as above described, and "desired the council to accept his plan of sub-dividing his land near the convent as per plan exhibited at this meeting, and to give consent to the registering of the same."

Whereupon the following resolution was passed: "That M. J. O'Brien, proprietor of lot 11 in the 1st concession of the Township of Horton and part of lot 11 in the 2nd concession of the said township, be allowed to lay out streets of a less width than 66 feet in sub-divisions of part of said lots, and that the plans of John R. Allen, O.L.S., dated May 7th, 1895, of said sub-division in 1st concession of said township, and of Frank Purvis, O.L.S., of said sub-division in the 2nd concession of said township, be allowed, and that the streets shewn in the former of a width of 50 feet, and in the latter of a width of 40 feet, be accepted and the consent of this corporation given to the filing and registration of aforesaid plans."



Judgment.

ARMOUR, C.J.O.

It is not necessary in the view I take to discuss the question whether or not this plan complied with the provisions of the statutes, R.S.O. (1887) ch. 152, sec. 63, and 56 Vic. ch. 21 (O.), sec. 96 *et seq.*

This plan, signed by Plaunte and O'Brien, was express evidence of the dedication by them to the public of the land thereon laid out by them for a highway, and the resolution passed by the council accepting this plan with the said land so laid out thereon as a highway of the width thereon indicated, was a virtual consent by the council to the laying out by Plaunte and O'Brien of the said land for a highway of the width indicated upon the plan.

The land so laid out by Plaunte and O'Brien, and dedicated by them to the public for a highway, the council of the municipality having consented to its being laid out to the width to which it was laid out, and the public having used it as it was shewn they had, became a highway to the full extent to which it was laid out, and thereupon became vested in the municipality : Consolidated Municipal Act, 1892, sec. 527.

But its being vested in the municipality did not of itself render the municipality liable to keep it in repair under section 531 of the said Act "until established by by-law of the corporation, or otherwise assumed for public user by such corporation."

It may be that the effect of the resolution of the council accepting the said plan might be held to be an assuming it for public user by the corporation, but the corporation went further, and in the summer of 1896 this highway was graded throughout its entire length under the orders of the committee of the council on roads and the cost of it was paid by the corporation, and this was clearly an assuming it for public user by the corporation.

In December, 1896, the plaintiff obtained a conveyance from Plaunte of lot 85 as shewn on the plan of Plaunte's property made before the dedication by him of the twenty

feet of it, and in 1898 the plaintiff moved out his fence so as to include this twenty feet, and upon the defendants threatening to have this fence removed, he brought this action to restrain the defendants from carrying out their threat, claiming this twenty feet as a part of his land.

In this he has failed, and the appeal must be dismissed with costs.

OSLER, J.A.:—

I am of opinion that the judgment of the Chancellor should be affirmed. It is proved that Plaunte, the plaintiff's predecessor in title, intended to dedicate for the purpose of a highway a strip of land twenty feet in width extending all the way from Quarry Street to Hall Street, including, therefore, the twenty foot strip off the north or northerly side of lot 85 on the corner of Quarry and Barr Streets, which is the parcel in question in this action.

One O'Brien, the proprietor of the land adjoining Plaunte's land, also intended to dedicate a strip of similar length and width of his own land for a similar purpose, the two strips together forming a highway or road forty feet in width. One way in which these two owners expressed their intention was by jointly signing, and afterwards causing to be registered in the County Registry Office, a surveyor's plan of their properties on which the road so dedicated was laid out and described. Between that part of the 40-foot road so dedicated which bounded the residue of Plaunte's lot 85 on the north and the south side of property belonging to the Roman Catholic Episcopal Corporation of Pontiac, a road or way had already been permitted to exist by agreement between the latter and their vendor, who was the predecessor in title of O'Brien, but subject to the existence of such way O'Brien had acquired the whole of the land lying between Plaunte's lot 85 and the property of the Episcopal Corporation. The plan signed by Plaunte and O'Brien thus shewed

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ARMOUR, C.J.O.

Judgment.

OSLER, J.A.

the street sixty feet wide instead of forty feet along what, if the dedication has become effectual, is now the north side of lot 85. Plaunte and O'Brien further evidenced their intention to dedicate the street by each removing his fence, where it was necessary to do so, twenty feet back from the line on which it had formerly stood, and in particular Plaunte did so on his lot 85. After this was done, and before the plaintiff bought that lot from Plaunte, the defendants caused the street so dedicated to be graded as a street from end to end, and public money has been expended in paying for the work thus done upon it in preparing it for public use. Thus there is evidence both of dedication and of what is essential to make dedication effectual or irrevocable, that is to say, acceptance of such dedication, not only by public user but also by the assumption of it by the defendant corporation otherwise than by by-law, that is to say, by the expenditure of public money thereon (Municipal Act, R.S.O. ch. 223, secs. 598, 601), and the road has thus become vested in the defendant corporation (sec. 601): *Moore v. Woodstock Woollen Mills Co.* (1899), 29 S.C.R. 627; *Pittsburg v. Epping-Carpenter Co.* (1900), 45 Atl. Rep. 129. On that side of the road which adjoins the property of the Episcopal Corporation, but which is not part of the forty foot strip, the town has laid down a sidewalk, and the dedication of that part, though it has nothing to do with the present case, seems, therefore, to be final and complete as against O'Brien.

I attach no particular weight to the resolution of the town council accepting Plaunte and O'Brien's plan and authorising the laying out of a road forty feet in width (Municipal Act, R.S.O. ch. 223, sec. 630 (2)). So far as it is of importance, it goes to shew acceptance of the dedication by the council.

The plaintiff's action, therefore, to prevent the defendants from restoring the fence along lot 85 to the line to which Plaunte had removed it fails and was properly dismissed by the learned trial Judge.

MOSS, J.A. :—

Judgment.

MOSS, J.A.

The evidence fully establishes an intention on the part of the plaintiff's vendor, Plaunte, to dedicate the twenty foot strip in question as part of a public highway extending from Hall Street to Quarry Street. That intention is shewn first by the agreement between O'Brien and Plaunte, the contiguous owners, that each should give twenty feet on his side of the line fence for a street to be opened through from Hall Street; secondly, by Plaunte building his north-easterly line fence from Hall Street to Quarry Street at a distance of twenty feet south-westerly from the dividing line between him and O'Brien; and thirdly, by his joining in and signing a plan prepared for O'Brien on which was clearly delineated and shewn the street formed by the placing of the fences in accordance with the agreement.

It is said that as regards the twenty feet in question which lay on the north-easterly side of lot 85 according to Allen's plan of Plaunte's section, Plaunte was not aware that O'Brien was already under obligation to devote forty feet of his land contiguous to lot 85 for a street, and that if he had supposed that such was the case he would not have moved his fence at that point, or agreed to twenty feet of his lot 85 being thrown into the highway. But the O'Brien plan which Plaunte signed shews that while the street from Hall Street to the rear of lot 85 is marked as  $60\frac{6}{10}$  links, or forty feet, wide, that part from the rear of lot 85 to Quarry Street is marked  $90\frac{9}{10}$  links, or sixty feet wide. And Plaunte does not dispute the agreement to give the twenty feet in question as well as the other parts of his land shewn on the O'Brien plan.

These acts of Plaunte were followed by the performance of some work done on the twenty feet in question by employees and workmen of the town corporation, and the resolution of the town council agreeing to the O'Brien plan.



Judgment.

Moss, J.A.

Such work as was done by the town at that time, though not very extensive, indicated an intention to adopt the twenty feet in question as part of the forty foot street agreed to by the resolution. The fact that the town afterwards put down a sidewalk on the extreme north-easterly side of the sixty feet only shews a subsequent intention to adopt the whole sixty feet at that particular point.

The whole roadway, including the twenty feet in question, remained open to the public until after the plaintiff purchased from Plaunte and took a conveyance of lots 84 and 85, dated 24th of November, 1896, when he moved the fence out so as to take in the twenty feet.

I think there was, before he did this, such an acceptance and user of the twenty feet as to disentitle Plaunte or the plaintiff to retract the dedication or resume possession, and that the defendants were justified in claiming it as part of the public highway.

On these grounds I would affirm the judgment and dismiss the appeal.

MACLENNAN, and LISTER, JJ.A., concurred.

*Appeal dismissed.*

R. S. C.

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## GOLDIE V. BANK OF HAMILTON.

*Mortgage—Machinery—Vendor's Lien—Priorities—Insurance—  
Subrogation.*

Under a contract with the owner of a mill and machinery which was subject to three mortgages (the second and third in favour of the same mortgagees), each containing a covenant to insure, the plaintiffs took out the machinery replacing it with new machinery, reserving a lien thereon for the balance of the price, the lien agreement providing that the mill-owner should insure the machinery for the plaintiffs' benefit. Before any further insurance was effected the mill and machinery were destroyed by fire :—

*Held*, upon the evidence, MACLENNAN, J.A., dissenting, that the second mortgagees had consented to the purchase of the new machinery upon the terms specified, and, as a result of that finding, that the plaintiffs were entitled, subject to the first mortgagee's claim, to payment of the insurance money on the machinery and to be subrogated to the first mortgagee's rights against the land to the extent to which that insurance money was exhausted by him.

Judgment of MEREDITH, C.J., 31 O.R. 142, affirmed.

AN appeal by the defendants from the judgment of MEREDITH, C.J., reported 31 O.R. 142, was argued before OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 6th of June, 1900. The letter of the defendants upon the meaning of which the decision in this Court turned, is set out in the judgment of MACLENNAN, J.A., and the facts are stated in that judgment and the report below.

Statement.

*Aylesworth*, Q.C., and *William Lees*, for the appellants. The letter of the bank has not the meaning which has been given to it; it was not intended that the bank's claim should be postponed to the plaintiffs' lien, and this is not a reasonable construction to put upon the language used. The old machinery could not be taken out of the mill without the bank's consent, and it was to that that the consent was directed and to nothing more. The plaintiffs should have insured the machinery for their own benefit, or should have insisted on Harper & Co. insuring and assigning the policy to them. The omission of Harper & Co. to insure raises no equity against the bank, who have been deprived by the judgment appealed from of the security upon which they were relying, while the

Argument.

plaintiffs are put in a much better position than they expected to be in.

*Riddell*, Q.C., and *H. E. Rose*, for the respondents. The bank, with all the terms of the contract between the plaintiffs and Harper & Co. before them, assent to that contract, and therefore to the lien therein reserved, and to the provision for insurance therein contained. That being so, as against the bank, the existing insurance must be treated as applicable to the contract, though not in form assigned: *Greet v. Citizens' Ins. Co.* (1879), 27 Gr. 121; (1880), 5 A.R. 596; *Ames v. Richardson* (1882), 29 Minn. 330. If the first mortgagee has a right to claim the insurance money of the machinery, the plaintiffs are entitled to be subrogated to his rights as against the land: *Flint v. Howard*, [1893] 2 Ch. 54; *Barnes v. Racster* (1842), 1 Y. & C.C.C. 401; *Bugden v. Bignold* (1843), 2 Y. & C.C.C. 377; *In re Rorke's Estate* (1865), 15 Ir. Ch. 316; *Aldrich v. Cooper*, 2 W. & T.L.C. (Hare's ed.), at p. 255; Article, 27 Am. L. Reg. 739. It would seem, however, that the first mortgagee has no claim to the insurance money of the machinery, though it is not necessary to go as far as that in order to uphold the judgment: R.S.O. ch. 149, secs. 1, 10. The machinery may be fixtures, but the plaintiffs' rights as unpaid vendors are preserved by the Act. *Aylesworth*, in reply.

November 13th, 1900. OSLER, J.A. :—

If the view taken by the Court below of the meaning of the defendants' letter to Harper & Co. of the 15th of November, 1897, be the right one, the case presents no real difficulty. At that time the situation of the defendants—by whom I mean the bank, the defendant Turnbull being merely their agent and trustee—was that of second mortgagees.

Their mortgage contained the usual covenant to insure, but no policies had been obtained thereunder directly in their favour. One Wilson was the first mortgagee, and

his mortgage contained a similar covenant, in pursuance of which policies had been issued which covered the machinery then on the mortgaged premises. To the benefit of these the defendants, as second mortgagees, were indirectly entitled, as being securities held by the first mortgagee. The mortgagor was then minded to place new machinery in her mill in lieu of the old, which had been insured, as I have said, by the policies in question. The first mortgagee was (in effect) not dealt with on the subject but the defendants were. Their mortgagor submitted to them the contract proposed between herself and the plaintiffs, by the terms of which the old machinery was to be taken away by them and the title to the new and substituted machinery was not to pass to the mortgagor until paid for. It was to be removable by the plaintiffs on default of payment, and the mortgagor agreed to insure it to its full insurable value.

The defendants, thereupon, by their letter of the 15th of November, 1894, acknowledged that they had read the proposed contract and consented to the changes being made in accordance with the proposal therein set forth. This consent was obtained for the purpose of being communicated, and it was communicated, to the plaintiffs before they put up the new machinery. The insurance company, acting reasonably and fairly, have been content to regard their policies as covering that machinery, and therefore, as between all parties, they must be so treated: *King v. Victoria Insurance Co.*, [1896] A.C. 250.

Now, the effect of the defendants' consent, in my opinion, was, as the learned trial Judge has held, to place them in the position of the mortgagor. Unless it means that, it seems to mean nothing. They had actual notice of the terms on which alone the plaintiffs were willing to put in the new machinery, and their consent would be a snare and delusion unless it is read as a consent to its being put in on the terms contracted between their mortgagor and the plaintiffs. The case of *Gough v. Wood*, [1894] 1 Q.B. 713,

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OSLER, J.A.

though different in its circumstances, in principle, I think, strongly supports the plaintiffs' position. The defendants gave up the old machinery, which they could have held as against every one but the first mortgagee, and consented that the new should be put in. The title to that was to remain in the plaintiffs until it was paid for; and as against the mortgagor and the defendants, the plaintiffs were at liberty to remove it in case of default in payment, and the purchaser, the mortgagor, agreed to insure it for the plaintiffs' better security. It followed that, subject to Wilson's mortgage, the plaintiffs became interested in the existing insurance on the machinery on the same principle as the defendants had been: *Greet v. Citizens' Ins. Co.* (1879), 27 Gr. 121; (1880), 5 A.R. 596; *Ames v. Richardson* (1882), 29 Minn. 330; and that the latter were, by virtue of their assent, postponed in interest to the plaintiffs, who thus acquired a lien on the policies affecting the machinery in priority to them. The mill and machinery have now been burnt; the insurance on the latter has been paid into Court, and the defendants have paid off Wilson and taken an assignment of his mortgage and the policies. The property is more than sufficient to discharge both the Wilson mortgage and the plaintiffs' claim. That the whole stands charged with the former, no doubt; but while the plaintiffs have a lien upon the insurance paramount to the defendants' claim thereon, they have none upon the rest of the property. The acquisition by Turnbull, on behalf of the defendants, of the Wilson mortgage, can work no alteration of the rights of the parties. And if and so far as Turnbull or the defendants elect to satisfy the Wilson mortgage out of the fund arising from the insurance upon the machinery, and thus to disappoint the claim of the plaintiffs thereon, to that extent the plaintiffs, on the principle of marshalling, are entitled to be subrogated to the rights and position of Turnbull or the defendants under the Wilson mortgage in respect of the residue of the mortgaged premises to the

extent of the security they would have had by means of the insurance under their agreement with Harper. As the Wilson mortgage is now overdue, the point as to the defendants' right to retain the insurance in the meantime, ceases to have any force.

The appeal should therefore be dismissed.

MOSS, J.A. :—

This is an appeal by the defendants from the judgment of Meredith, C.J., who tried the case without a jury. The facts are fully set forth in his opinion.

The plaintiffs did not acquire, by virtue of their agreement with Harper & Co., any lien or charge upon the lands or mill buildings upon or in which they placed machinery. But, as against Harper & Co., they retained a special property in the machinery, and I think Turnbull's letter of the 15th of November, 1897, gave them priority in respect of such machinery over the bank's mortgage.

At the trial the letter annexed to the two documents comprising the contract between Harper & Co. and the plaintiffs, was produced and put in by them. It is plain, I think, that when that letter was written, Turnbull had before him the whole contract or the documents forming it, and that he was aware of the terms on which the plaintiffs were proposing to place their machinery in the mill, and that the letter was written with the intention that it should be, as in fact it was, sent to the plaintiffs before they did any work at the mill.

By the agreement with Harper & Co., the machinery remained, as against them, the property of the plaintiffs, though affixed to the mill premises, and the plaintiffs were entitled to remove it in default of payment according to the terms of the agreement. The bank consented to place itself in the same position, and it could not complain of the removal of the old machinery nor deny that the machinery substituted for it continued to be the plaintiffs'

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MOSS, J.A.

property until paid for. Therefore, in a contest between the plaintiffs, the bank, and Harper & Co., as to the ownership of the substituted machinery at the time of the fire, the question would have to be resolved in the plaintiffs' favour.

Wilson, on the contrary, preserved all his rights, and as against him the plaintiffs were not in a position to claim that their machinery was not subject to his mortgage. They placed their machinery in the mill with notice of Wilson's mortgage, which by its terms expressly covered all the machinery, etc., in or upon the premises, and with the additional knowledge that Wilson insisted upon all his rights under his mortgage. So far as he was concerned, the machinery with which the plaintiffs replaced what they took out or removed in the process of reconstruction of the manufacturing plant became part of his mortgage security. The insurances on machinery, by which his security was supplemented, continued to enure to his benefit, and as between him and all the other parties he was entitled to the amount payable under the policies.

Upon the happening of the fire, Wilson was entitled to receive the insurance moneys for which the insurance companies were willing to acknowledge liability under the policies covering the machinery. But he was at liberty, if he saw fit, to waive his right for the benefit of the others concerned. Supposing he did so, who would be entitled? Not Harper & Co., for they had expressly agreed to insure for the benefit of the plaintiffs and to assign the policies to them, and the plaintiffs could insist in equity upon Harper & Co. doing everything necessary to entitle them to receive the moneys derived from the policies in question. Not the bank, for it had agreed to what had been agreed between the plaintiffs and Harper & Co.

So that, in that case, the insurance moneys would be receivable by the plaintiffs.

Or, supposing that with other means Harper & Co. had paid off Wilson's mortgage, leaving the insurance moneys

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MOSS, J.A.

untouched, would not the plaintiffs have the first claim to them? Assuming the sole question to be the right to the proceeds of the insurance on the machinery—Wilson or his assignee making no claim—the plaintiffs would be entitled to so much as represented the insurable value of the machinery which remained their property at the time of the fire.

They can be disappointed of this only by Wilson or his assignee laying claim to the fund, but in that event the plaintiffs' equity to claim that they are entitled to stand in his place as mortgagee of the lands, to the extent to which they are deprived of resort to the only fund to which they had direct recourse, is open to them upon the pleadings and established facts.

It is, however, only made possible as against the bank by reason of its assent to the agreement between the plaintiffs and Harper & Co., and to what was done under that agreement.

The consent reduces the bank to the same position as Harper & Co., and lets in the application of the doctrine of marshalling or subrogation to the same extent as if the bank was either not an encumbrancer at all, or was only an encumbrancer expressly subject to and after payment of the amount of the Wilson mortgage and the plaintiffs' claim in respect of their machinery. See notes to *Aldrich v. Cooper*, 1 W. & T. L. C., 7th ed., p. 58, and *In re Mower's Trusts* (1869), L.R. 8 Eq. 110.

It is true that when this action was commenced Turnbull, as assignee of Wilson, was not compellable to apply the insurance moneys as payment upon his mortgage. But if he claimed these moneys as the party entitled to receive them, and in due time to apply them and their avails upon his mortgage, he thereby elected to deprive the plaintiffs of recourse to them, and the plaintiffs' equity to be substituted as against the lands arose.

A declaration of that right and its working out in due course could not prejudice Turnbull. And neither the



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bank nor Harper & Co. are injuriously affected unless the judgment as issued has the effect of accelerating the remedies against them under the Wilson mortgage. By the terms of that mortgage, the principal moneys thereby secured did not fall due until October, 1899. The judgment was pronounced on the 14th of July, 1899, and is so framed that if it were worked out very promptly, according to its terms Turnbull might be compelled to accept payment before the day specified in the mortgage. But that was a matter which might have been guarded against in framing the judgment, and, if necessary, by motion to vary the minutes.

At the present time it is of no practical importance, for the time of payment has now arrived.

I would affirm the judgment and dismiss the appeal with costs.

LISTER, J.A. :—

I agree.

MACLENNAN, J.A. :—

I am, with great respect, unable to put the construction upon the bank cashier's letter of the 15th of November, 1897, which has been put upon it by the learned Chief Justice in the Court below.

The bank had two mortgages, dated respectively the 20th of October, 1894, and the 1st of February, 1896, on the land, and the mills and machinery thereon, to secure a large indebtedness. These mortgages were subsequent to another mortgage on the same premises for \$8,500 to one Wilson. Both the Wilson mortgage and the bank mortgages contained covenants by the mortgagor, Mrs. Harper, to insure buildings and machinery to their full value, and to assign the policies to the mortgagees.

The mortgagor effected insurance in all to the amount of \$7,500, all expressed to be payable to Wilson as

mortgagee. Of this, \$2,500 was on buildings, and the remainder on machinery, of which \$500 was upon machinery in a barley mill to which the plaintiffs' contract had no reference.

In that state of matters, Mrs. Harper, wishing to substitute new machinery for the existing machinery in the flour mill, contracted with the plaintiffs to make the change. The contract consists of two letters, both dated on the 10th of November, 1897.

The plaintiffs' letter proposes to furnish and deliver the necessary machinery and to do all millwright work, and to start up the mill satisfactorily; and then proceeds to specify, with great minuteness and detail, the work to be done and the manner of doing it, and the materials and machinery to be supplied; and guaranteeing that all work would be done in a thoroughly workmanlike manner. Mrs. Harper's letter is an order for certain specified machinery "and do all millwright work and start up mill, as per your letter of November 10th, 1897, for the sum of \$3,900 and the old machinery now in the mill, f.o.b. cars Dundas." It then goes on to specify times of payment, and to agree that the title to the machinery shall not pass until full payment, that the plaintiffs may remove the same in case of default, and also that Mrs. Harper will insure the machinery to its full insurable value and assign the insurance to the plaintiffs.

Now, Mrs. Harper had no right to make this proposed change of machinery if either of the mortgagees, Wilson or the bank, chose to object. The risk to Wilson was probably not very great, for he had the first mortgage, but it was a much more serious question for the bank. An application for consent seems to have been made to Wilson, but the learned Judge finds, and I think rightly, that he refused; but he made no strong objections. Mrs. Harper then applied to the bank, and there is no evidence of what was asked for, beyond what appears in the letter of Mr. Turnbull, the bank cashier, of the 15th of November.

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MACLENNAN,  
J.A.

Judgment.

MACLENNAN,  
J.A.

That letter is addressed not to the plaintiffs but to Mrs. Harper, by the name under which she was carrying on her business, and it is as follows:—

“ Hamilton, Ont., 15th Nov., 1897.

Messrs. Geo. H. Harper & Co.,  
Dundas.

Dear Sirs:—

We have considered the proposal made to you by the Goldie & McCulloch Company, and have carefully noted the contents of their letter attached to the proposed contract, which, we understand, is to form part of the same.

In view of the satisfactory assurances there given, the bank will consent to the change being made, in accordance with the specifications set forth in the proposed contract.

Yours faithfully,

‘J. TURNBULL,’  
Cr.”

All that the bank were concerned with was whether they would allow the change of machinery to be made; whether they would take the risk of allowing the old machinery to be taken out, and new machinery to be put in its place. It appears to me, with great respect, that Mr. Turnbull’s letter does no more than is simply and clearly expressed when he says that “the bank will consent to the change being made, in accordance with the specifications set forth in the proposed contract.” I think the whole letter shews that no more was intended, and that no more is expressed. He says: “We have considered the proposal made to you by the Goldie & McCulloch Company, and have carefully noted the contents of their letter, . . . which is to form part of the (contract.)” Now, that letter contains nothing but a specification of the machinery, and the details of the work to be done, and the manner in which they proposed to do it, and a guarantee of good workmanship and of the capacity and efficiency of the

mill when completed, and also of the time of completion. Then he says, that in view of the assurances *there* given—that is, in the plaintiffs' letter—which is to be part of the contract, the bank will consent to the change being made in accordance with the specifications set forth in the contract thus proposed. I think this letter does not admit of the word "specifications" being construed to include the terms of payment and security, as if the bank were intending to agree that their mortgages should be postponed to the claims of the plaintiffs for payment, to the extent of the value of the new machinery.

If I am right in my view of the meaning of Mr. Turnbull's letter, it is an end of the case. Wilson had the land, the buildings, and the machinery, and he had besides the insurance on the buildings and the insurance on the machinery. The bank had the same securities, precisely, as Wilson; for, although Wilson alone had an actual assignment of the insurance, the mortgagor's covenant made the bank mortgagees of the insurance, after Wilson. The plaintiffs, on the other hand, had only the mill machinery and the insurance thereon. Mrs. Harper's stipulation as to the title, and the covenant to insure, were binding as between her and the plaintiffs. The buildings and the machinery no longer exist, and the plaintiffs have security only upon the insurance on the machinery. Under these circumstances, the plaintiffs' sole right is to require the bank to exhaust the land and the insurance on the buildings, and upon the machinery of the barley mill, for the satisfaction of both the Wilson mortgage and their own mortgages, before resorting to the insurance on the machinery, so as to leave for the plaintiffs what, if anything, of the insurance on the machinery may then remain.

In my opinion the appeal should be allowed, and the action should be dismissed with costs, unless the plaintiffs

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MACLENNAN,  
J.A.



Judgment.MACLENNAN,  
J.A.

choose to take a redemption judgment, on payment of the costs of the appeal and of the action up to the hearing.

*Appeal dismissed, MACLENNAN, J.A., dissenting.*

R. S. C.

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COLLIER V. MICHIGAN CENTRAL RAILWAY COMPANY.

*Negligence—License—Master and Servant—Railways—Damages—  
New Trial.*

The plaintiff's son was given leave by a yardmaster of the defendants to learn in the railway yard the duties of car-checker, with the expectation that if he became competent he would be taken into the employment of the defendants in that capacity, and he was free to devote as much or as little time to acquiring the necessary knowledge as he saw fit. While he was in the railway yard a few days after this permission had been given he was killed by an engine of the defendants which was running through the railway yard without the bell being rung though the rules of the defendants required this to be done :—

*Held*, that the deceased was a licensee and not a trespasser ; that the defendants were bound to exercise reasonable care for his protection ; and that the omission to give the warning was negligence which made them liable in damages for his death.

Judgment of BOYD, C., affirmed.

The Court being of opinion, however, that damages of \$3000 allowed by the jury were excessive, ordered that there should be a new trial unless the plaintiff should consent to accept \$1500.

Statement.

APPEAL by the defendants from the judgment at the trial.

The plaintiff brought the action on behalf of himself and his wife to recover damages for the death of their son, caused, as was alleged, by the negligence of the defendants. The deceased was an unmarried man, twenty-two years of age, a draughtsman by occupation, earning when employed from two to three dollars a day. He lived with his parents in Windsor, and being out of work applied to the yardmaster of the defendants at that place for employment as a car-checker, the wages paid by the defendants to persons filling that position being at the time about \$37.50 a month. The yardmaster gave him permission to qualify

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himself for the position, with the expectation held out to him that he would be employed if he became competent and a vacancy occurred, and he was told to go with the then acting car-checker to learn the work. He was not to be paid anything while learning, and was free to devote as much or as little time as he saw fit to acquiring the necessary knowledge. This arrangement was made on Saturday, the 26th of August, 1899. On the following Monday the deceased went to the railway yard and stayed till noon. He went again next morning, and while walking along one of the tracks in the railway yard he was struck by the tender of an engine which was backing behind him and was killed. The rules of the defendants directed that when a engine was backing in the yard its bell should be rung; there was conflicting evidence as to whether this had been done; and also as to the rate of speed, and the keeping of any look-out from the tender. There was no direct evidence for what purpose the deceased was walking along the track, though it was suggested that he had been sent from the office to take the number of a car and he was not with the car-checker at the time. The deceased was a careful, sober young man, in the habit of giving nearly all his earnings to his mother.

The action was tried at Sandwich on the 18th and 19th of April, 1900, before BOYD, C., and a jury, who returned a general verdict in favour of the plaintiff. They assessed the damages at \$3000, having been warned in the charge to fully weigh the many contingencies, such as the death of the mother, the marriage of the deceased, and to allow only the amount of financial benefit which the parents could reasonably expect to receive. The jury also stated, in answer to the learned Chancellor's oral question as to the ground of negligence, that it consisted in "sending no instructor with the young man when he was sent out to check the cars, and also respecting the ringing of the bell." Judgment was entered in the

Statement.

plaintiff's favour, \$1000 to be paid to him and \$2000 to the mother.

The appeal was argued before ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 17th and 19th of October, 1900.

*I. F. Hellmuth*, and *J. Montgomery*, for the appellants. There is nothing in the evidence to support the finding of negligence in not sending an instructor with the deceased while he was in the yard; he was to learn the duties of a car-checker at his own time and in his own way, and it would be most unreasonable to expect the company, when they were getting no benefit whatever from the deceased's services, to send an "instructor" with him, whose only usefulness could be to guard him against the consequences of his own carelessness. The place was undoubtedly one of danger; the deceased must have known this; and this fact ought in itself to have been sufficient warning to him. Besides, he was told to accompany the checker, and there is no evidence to shew why he was not obeying this direction; he was, therefore, in effect a trespasser. At the most he was a licensee, taking the risk of danger from the traffic going on around him. In any view, the damages are excessive. If the deceased was a workman in the defendants' employment, and this would appear to be the proper conclusion on the plaintiff's evidence: *Blakemore v. Bristol and Exeter R.W. Co.* (1858), 8 E. & B. 1035, at p. 1048, the damages would be limited to \$1500; if not a workman, then the amount of financial benefit to be expected has been largely exceeded, and there should be a new trial or a reduction of damages: *Rombough v. Balch* (1900), 27 A.R. 32.

*F. A. Anglin*, and *J. E. O'Connor*, for the respondent. The deceased was not a trespasser, but was on the premises of the defendants at their instance and invitation, and they are liable for their want of care: *York v. Canada Atlantic S.S. Co.* (1893), 22 S.C.R. 167; *Carroll*

v. *Freeman* (1893), 23 O.R. 283. He was not a railway servant within the meaning of the Workmen's Compensation for Injuries Act, that term being applicable only to persons doing manual labour: Minton-Senhouse and Emery's *Accidents to Workmen*, p. 34; Ruegg's *Employers' Liability Act*, 4th ed., p. 42. The damages are therefore at large, and the jury's assessment, arrived at after a very full and careful direction as to their duty, should not be disturbed.

*Hellmuth*, in reply.

November 13th, 1900. The judgment of the Court was delivered by

ARMOUR, C.J.O. :—

The plaintiff brought this action for damages for the death of his son, caused, as was alleged, by the negligence of the defendants' servants.

On the Saturday previous to his death the deceased applied to the yardmaster of the defendants at Windsor wanting the position of car-checker, and the yardmaster gave him permission to learn the business to qualify himself for the position, and for that purpose to go with the man who was checking the cars.

The deceased came to the yard on the Monday morning following and stayed till noon, and came again the following morning, and was seen walking on one of the tracks with his back towards an engine and tender which were running reversely on the same track to the round-house, when he was struck by the tender and killed. There was no evidence for what particular purpose the deceased was walking on the track at the time he was killed. The yardmaster said he heard he went down to look at a car, but that he had no knowledge of why he went, and the deceased's mother said that the yardmaster told her that he had gone down to get the number of a car that they had forgotten to get the night before, but this seems to have been mere surmise.



Judgment.

ARMOUR, C.J.O.

The position of the deceased at the time he was killed was not that of a servant of the defendants; he was not subject to their control, and it is not shewn that at the time he was killed he was obeying the orders of any one acting for the defendants.

He was not therefore a "railway servant" within the meaning of "The Workmen's Compensation for Injuries Act," and did not come within the provisions of that Act.

His position was, in my opinion, that of a licensee, being there for his own benefit.

He was however there, where he was killed, by the express permission of the defendants, through their yardmaster, whose authority to give such permission was shewn, and being there by their permission it became their duty to take reasonable care not to act so as to injure him: *Gallagher v. Humphrey* (1862), 6 L.T.N.S. 684; *Thatcher v. Great Western R.W. Co.* (1893), 10 T.L.R. 13.

Those in charge of the engines of the defendants were enjoined by the defendants to ring the bell in running in their yards, and this shewed that the defendants considered this a reasonable and proper precaution to be taken under such circumstances, and the neglect of it was therefore evidence to go to the jury of want of reasonable care on the part of those in charge of the engine by which the deceased was killed: *Dublin, Wicklow and Wexford R.W. Co. v. Slattery* (1878), 3 App. Cas. 1155.

The evidence was conflicting as to whether or no the bell was being rung upon the engine at the time the deceased was killed, but the jury found that it was not, and that the omission to ring the bell was negligence on the defendants' part, and this, their finding, cannot be interfered with.

The question of contributory negligence on the part of the deceased was submitted to the jury, and disposed of by them, and there is no reason for disturbing their finding in this respect.

As to the damages, they are, in my opinion, excessive, and lead to the conclusion that the jury must have taken into consideration something more than the reasonable expectation of pecuniary benefit to be derived by the plaintiff from the continuance of the life of his son.

Judgment.

ARMOUR, C.J.O.

Had the deceased become a car-checker in the employment of the defendants, and had then been killed, the plaintiff could not then, having regard to the wages of a car-checker, have recovered more than fifteen hundred dollars.

Under the circumstances of this case, I think that fifteen hundred dollars would be ample compensation to the plaintiff for the loss he has sustained, and that if he will consent to reduce the damages to fifteen hundred dollars, the appeal will be dismissed with costs; otherwise there will be a new trial, costs of the former trial and of this appeal to be disposed of by the trial judge.

*New trial unless damages reduced.*

R. S. C.

## MCCRIMMON V. TOWNSHIP OF YARMOUTH.

*Water and Watercourses—Ditches and Watercourses Act—Railway.*

An award under the Ditches and Watercourses Act directed that a drain should be built by the initiating owner a certain distance along a highway of the defendants, then by the defendants along the highway to a point opposite the land of a railway company, then by another land owner, and then by the railway company along the highway, or across the highway through their own land, as far as might be necessary to give a proper outlet. The drain was built by contract under the Act as far as the point opposite the railway company's land, but the railway company, whose railway had been declared to be a work for the general advantage of Canada, refused to recognize the award or do the work directed. The defendants then built a culvert across the highway and brought the water to the railway company's land, and the railway company thereupon built an embankment to keep it back, the result being that it overflowed from the highway ditches and caused damage to the plaintiff:—

*Held*, that there was no jurisdiction under the Ditches and Watercourses Act as far as the railway company were concerned; that the award was therefore no protection to the defendants; that the damage resulted from the construction of the culvert; and that the defendants were liable therefor.

Judgment of ROSE, J., affirmed.

## Statement

APPEAL by the defendants from the judgment at the trial.

The action was brought to recover damages for injuries caused by overflowing water, and was tried at St. Thomas, on the 9th of November, 1899, before ROSE, J., who, on the 16th of February, 1900, gave the following judgment:—

ROSE, J.:—

The plaintiff, suing on her own behalf as well as on behalf of her children, and on behalf of the estate of Edward McCrimmon, deceased, her husband, claims from the defendants, the Township of Yarmouth, damages for injury to property, and to her own health and the health of her husband, causing his death from disease, induced by the unsanitary condition of the property, all alleged to have been the result of the flooding of her land by water, said to have come down through a drain on the highway of the defendants.

Judgment.

ROSE, J.

The plaintiff alleges that the cause of the trouble was the alteration of the drainage of the lands to the rear and south and east of her property, changing its course from that which it would have followed naturally, and causing it to flow by her property to a culvert so negligently constructed as not to carry off the water, causing it to flow upon her property.

The real attack upon the defendant corporation at the trial was for permitting water which flowed through what is called the "award drain" to come down through the drain upon the construction road to be discharged upon the plaintiff's property.

Lands owned by one Bailey were to the east and north and some distance from the plaintiff's property. Bailey desired to drain his lands, and in 1892 took proceedings under the Ditches and Watercourses Act. An award was made by the engineer on the 28th of May, 1892, directing Bailey to construct the first section of the drain; the defendant corporation to construct the second section; one J. A. Smith to construct the third section; and the Canada Southern Railway Company the fourth section. The sections directed to be constructed by Bailey, and the township were to be made of tiles; a portion of that to be constructed by Smith was to be a tile drain; and the balance an open drain. The railway company had the option of making an open drain or a tile drain.

The drain was to commence at a point in the highway in front of Bailey's land, and was then to run along the highway to a point opposite the land of the Canada Southern Railway Company, and then across the highway into the company's land, or again along the highway, to a sufficient outlet.

Bailey constructed his portion of the drain; the township refused or neglected to construct its portion, and the engineer, under the Act, let that portion to be constructed. I cannot find upon my notes whether it paid for the construction, as provided for by the statute. I have asked



Judgment.

ROSE, J.

the reporter to refer to his notes, and he is unable to find any reference to the payment. I have an impression that something was said about it at the trial, but it does not, in my view, become material, or, at least in view of what I shall hereafter say, it is not necessary to delay the giving of judgment to ascertain how the fact was. Evidence of the fact may be supplied, if in the future history of the case it becomes a material question.

Smith constructed his portion of the drain, and in addition put a culvert or tile drain across the road from the end of the award drain to the railway fence. The effect of this was to throw the water upon the railway lands and allow it to go where it naturally would. The railway company put a bank of earth up so as to throw the water into the drain on the construction road, and it found its way down to and upon the plaintiff's land. For this extra work Smith was paid by the township. The railway company did not recognize the validity of the award, and did no work in pursuance of it.

I do not think that the company was subject to the jurisdiction of the engineer under the Act. See *Miller v. Grand Trunk R.W. Co.* (1880), 45 U.C.R. 222. Nor do I think it was subject to the Railway Ditches and Watercourses Act, R.S.O. ch. 286, which is confined to ditches, etc., "situate on the property of any such railway company and running along or under the railway": sec. 5 (1); and therefore the scheme of the engineer did not provide for a proper outlet, for by the award he directed the company "to carry it to a proper outlet without damage to adjacent lands, giving said ditch a fall of not less than one inch in four rods."

I assume, without deciding, that the township was not bound to obey the direction of the award, and that it did not and would not by reason of any act of the engineer become responsible for water which went down the award and construction road drains. See *In re Stonehouse and Plympton* (1897), 24 A.R. 416; *Gray v. Town of Dundas*

(1886), 11 O.R. 317. And I assume further, without deciding, that if when Bailey allowed the water from his land to enter the award drain it was incomplete and had no proper outlet, and thus was discharged upon the plaintiff's land, he was the wrongdoer and not the township.

But it seems to me, without deciding these questions, that the evidence of Smith so connects the township with the conducting of the water which flowed through the award drain from Bailey's property, as to make it responsible for any injury which happened to the plaintiff. True, its object was, no doubt, to throw the water upon the railway land and compel the railway to provide for it, the theory being, as I understand it, that but for the railway embankment the water would have found its way northerly across the land occupied by the railway, and so away from the land of Smith.

The fact, however, remains that the corporation did interfere with the water coming down the Bailey drain, and did undertake to give it a direction and to send it wherever it might go. The railway company had the right to make a bank to dam back the water and prevent it coming on its property, and the result of the embankment was to throw the water into the drain on the construction road, which subsequent to the agreement between the railway and the township became a township road.

I find as a fact that the water which came down through the award drain and through the construction road drain found its way to and on the plaintiff's property and did some damage.

[The learned Judge then dealt with some further alleged causes of damage, depending upon questions of fact, and directed that there should be a reference as to damages unless the defendants consented to have them fixed at \$150, the plaintiff being willing to accept that sum. He also held, upon the construction of certain agreements, that the defendants had no right to indemnity claimed by them

Judgment.

ROSE, J.

Statement.

against the Canada Southern Railway Company, who had been brought in as third parties.]

Judgment was subsequently entered in the plaintiff's favour for \$150, with costs, and the claim of the defendants against the third parties was dismissed with costs.

The appeal was argued before ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 26th of September, 1900.

*Aylesworth*, Q.C., and *J. M. Glenn*, for the appellants. If any injury has resulted it has been caused by the award drain, and the defendants are not liable; the only remedy, if there be any, is under the Act. At the least all the parties to the drainage scheme are equally liable, and there cannot be an attack on one. The appellants did not ask for the drain and should not be made to suffer because it has, as constructed, proved injurious to the plaintiff. A party to the scheme has no right of action, and an outsider is in no better position. See *Murray v. Dawson* (1867), 17 C.P. 588; *Hepburn v. Orford* (1890), 19 O.R. 585; *Dalton v. Ashfield* (1899), 26 A.R. 363; and *Seymour v. Maidstone* (1897), 24 A.R. 370. The engineer has, subject to the right of appeal, full control of the work, and no party brought in by him should be made responsible for his mistaken view of the best course to take. If the railway company had complied with the award there would have been no resultant injury, and they should be made responsible and not the appellants. [The learned counsel also dealt fully with the question of indemnity].

*D. W. Saunders*, for the third parties. The Ditches and Watercourses Act does not apply to the railway company: 53 Vict. ch. 69 (O.); 54 Vict. ch. 50 (O.); *Miller v. Grand Trunk R. W. Co.* (1880), 45 U.C.R. 222, and they were therefore justified in refusing to obey the award, and have done nothing to make them liable; they had the right to keep the water off their land. Moreover, no claim is made against them directly, and the indirect claim to indemnity is not sustainable upon the facts.

Argument.

*W. A. Wilson*, for the respondent. This is the simple case of sending water upon another's land without legal right, for the award is no protection and that is the only thing really relied on: *Ostrom v. Sills* (1897), 24 A.R. 526; (1898), 28 S.C.R. 485; *Fitzgerald v. Ottawa* (1895), 22 A.R. 297. The drainage scheme was in itself defective and useless, and the engineer assumed to exercise jurisdiction over the railway company when he had no right to do so, and on either ground the award is void. It is also bad because it directs that the ditch shall commence not on the land of the initiating owner but on the land of another person. The appellants could have appealed from the award; and not having done so and having brought the water to a point from which it could not escape without causing injury to the plaintiff, they are responsible.

*Aylesworth*, in reply.

November 13th, 1900. ARMOUR, C.J.O. :—

[The learned Chief Justice first dealt with the claim to indemnity, and held that it failed. He then read the Bailey requisition and award, and continued].

No one of the parties—W. E. Bailey, the Township of Yarmouth, and J. A. Smith—performed that portion of the work by the said award adjudged to be performed by such party, and such portions were let by the engineer to J. A. Smith, who performed them and was paid therefor.

The Canada Southern Railway Company paid no attention to this award and did nothing thereunder. Their railway was by the Act of the Dominion, 37 Vict. ch. 68, declared to be a work for the general advantage of Canada, and they were not therefore subject to the Ditches and Watercourses Act.

After the award was made, the corporation of Yarmouth instructed J. A. Smith to construct from a point in the award drain, on the south side of the construction



Judgment.

ARMOUR, C.J.O.

road, a culvert to the north side of the said road to carry the water brought down by the award drain upon the railway lands, which culvert he constructed, and was paid for it by the corporation, but the railway company prevented the water from being so carried upon their lands by constructing an embankment thereon.

Eventually the water brought down by the award drain appears, by the plans put in at the trial, to have been carried in an open drain along the south side of the construction road for about 400 feet from the end of the award drain, and then to have been carried by a culvert to the north side of the road, and thence by an open drain along the north side of the road to the approach to the overhead bridge, on the allowance for road between lots 7 and 8, and through the tile placed in the approach to the west side of the said allowance for road, and thence southerly along the west side of the allowance for road to a swale.

From the allowance for road between lots 7 and 8 through this swale a ditch had been dug, originally, it was said, by the Canada Southern Railway Company, when they dug the ditch down to the swale along the west side of the allowance for road as before mentioned.

This ditch was carried westerly between Warehouse Street and Steele Street (these streets running from the allowance for road between lots 7 and 8, and at right angles thereto to Park Avenue), and southerly till it reached Steele Street, close to the south-east corner of the plaintiff's land, when it was carried along Steele Street and through a culvert at Park Avenue.

The plaintiff's land was bounded on the west by Park Avenue, on the north by Warehouse Street, and on the south by Steele Street.

This ditch was joined at the allowance for road by a drain carrying water from the south-east off the lands lying in that direction.

The plaintiff's case was that, after the construction of the award drain and the waters therefrom were brought into this ditch, they caused the ditch to overflow and the water to spread over her land, and that the culvert on Steele Street at Park Avenue was not of sufficient size to allow the water carried down by the ditch to pass freely through it, and such water was thereby penned back upon her land.

Judgment.  
ARMOUR, C.J.O.

It is quite clear upon the evidence that all the water carried by the award drain, and indeed all the water brought upon the construction road between the award drain and the allowance for road between lots 7 and 8, would in its natural course have flowed to the north and upon the lands of the railway company and not towards or to the plaintiff's lands.

There is no doubt that the water carried by the award drain increased very materially the body of water brought into the ditch running past the plaintiff's lands, and was the cause of the overflow of the ditch and of the insufficiency of the culvert.

It was contended, however, that the corporation of Yarmouth were made parties to the award of the engineer against their will, and that no action could be brought against them for any injury sustained by reason of the water carried by the award drain.

But I do not think it fair to infer that they were made parties to the award against their will, for in my opinion the engineer had no power, except with their consent, to initiate the drain upon the allowance for road upon the requisition of Bailey that the drain should be initiated upon his land, and this being so, it is fair to infer that they gave their consent to what would otherwise have been a wrongful interference with the highway.

It is shewn, moreover, that they actively interfered to extend the drain beyond the part of it adjudged to be made by them, by directing the construction of a culvert across the road, from the end of the award drain, as con-

Judgment.

ARMOUR, C.J.O.

structed, to throw the water carried by the award drain upon the lands of the railway company.

And it is shewn that they carry the water from the award drain by means of drains on their highways into the ditch running past the plaintiff's land, and they are liable for the consequences of so doing.

It is quite clear, I think, that the corporation of the township of Yarmouth have no remedy over against the Canada Southern Railway Company for the damages recovered by the plaintiff's against them, for they did not arise either directly or indirectly "on account of the said alterations and diversions," but solely by reason of the acts of the said corporation themselves.

The appeal must be dismissed with costs.

OSLER, J.A. :—

The award under the Ditches and Watercourses Act appears to have been without jurisdiction, on the ground that, providing as it does for carrying the waters through the grounds of the Canada Southern Railway Company, who were not subject to the Act, no outlet was provided for them, and the whole scheme was incomplete and defective. It may be, also, that the engineer had no authority to direct the drain to be constructed except upon the lands mentioned in the requisition, but as to this I do not think it necessary to pronounce an opinion. The defendant township, then, must be taken to have permitted the drain to be constructed on the highway. I will take it that there is no proof that they paid for the part which was allotted to them to construct, but they have permitted the water to accumulate in the drain upon the highway, whence it passes into another drain, from which, it not having capacity sufficient to receive and discharge it, it flows over the plaintiff's land to her injury. The construction by the defendants of the culvert from the end of the award drain across the highway to the lands of the Canada Southern Railway Company, though it became

Judgment.

OSLER, J.A.

ineffectual and useless in consequence of the refusal of the company to receive the water, so that it passed back to the point of discharge from the award drain, is some evidence of the adoption by the defendants of the latter drain as a part of their drainage system, and, on this ground, I think the judgment below in favour of the plaintiff may be supported. I can see no pretence for saying that the railway company under their agreements with the township respecting the diversion of Talbot Street, or the township by-law, or under any of the facts appearing in the evidence, are bound to indemnify the township for the damages they are thus condemned to pay to the plaintiff.

The appeal must be dismissed with costs.

LISTER, J.A. :—

It is undisputed that the drain known as the "award drain" was made entirely upon and along the south side of the public highway, and that it was constructed under the assumed authority of an engineer's award bearing date the 28th of May, 1892, made under the Ditches and Watercourses Act, R.S.O. 1887, ch. 220, on the requisition of, and for the purpose, as therein stated, of enabling, one W. E. Bailey to properly cultivate his lands. The award directs and orders the Canada Southern Railway Company to "open up and properly construct and maintain either an eight inch tile drain or open drain carrying the water in its natural course, which is directly north, into the railway grounds, or conducting it along the roadway in its present course; but, in any case, to carry it to a proper outlet without damage to adjacent lands, giving said ditch a fall of not less than one inch in four rods, said work to be completed by the 15th day of June, A.D. 1892."

It will be seen that the scheme or plan was that the waters of the award drain should be discharged in and upon the lands of the company, which are situate to the north of the road, and not through the defendants' drain.



Judgment.

LISTER, J.A.

It is admitted that the defendants did not construct any part of the award drain which, under the award, they were required to construct, and that such work was let by the engineer under the assumed authority of the Act, and, I assume, was paid for by the defendants.

The railway company having refused to do the work which, under the award, they were required to execute, *i.e.*, the construction of the culvert across the highway to their own lands, the defendants constructed it, and the company thereupon threw up an embankment to prevent, and which in fact did prevent, the water of the award drain from being discharged upon their lands, with the result that such waters were discharged into and found their outlet in the road drain on the south side of the road, and were thereby carried to connecting drains, belonging to the defendants, down to and past the plaintiff's lands.

The evidence, I think, makes it reasonably clear that the award drain, by reason of there being no outlet to the north, collected and discharged into the defendants' drain a considerable volume of water, which, in times of freshet, in consequence of the incapacity of the defendants' drain to carry it off, overflowed and injured the plaintiff's lands.

The learned trial Judge's judgment rests upon the ground, that because the defendants by the construction of the culvert interfered with the water coming down the award drain, and undertook to give it a direction, they are liable to the plaintiff without regard to whether what they did, did or did not result in injury to the plaintiff. I am, with much respect, unable to assent to this proposition. No doubt what the defendants did with regard to the culvert was unauthorized, but unless their interference with the drain caused damages to the plaintiff, she would not be entitled to maintain her action merely because of such interference. If it were clear that the effect of the culvert was to divert a portion of the water brought down by the award drain, and thus to some extent avert injury to the plaintiff's land, it could not, I think, be well argued

that the defendants had incurred any responsibility for the damage actually sustained merely because of their interference. If, then, an action could not be maintained when the interference operated as a benefit, it certainly could not, as it seems to me, be maintained when in fact no injury could be attributed to such interference.

In the present case the evidence fails entirely to shew that the construction of the tile culvert occasioned any injury to the plaintiff. It was an eight inch culvert with, I assume, sufficient fall to conduct the water to the railway lands, and there is no evidence to shew that with the embankment water did or could escape from the culvert, or that if it did it could in any way cause any injury to the plaintiff.

The evidence of the plaintiff is that the drainage to the east, south and west of her lands, except in so far as it has been changed by the award drain, is in the same position and condition as it was at the time she acquired such lands, and that she suffered no injury from water until after the award drain was made; and she does not seem to complain of any injury due to the neglect of the defendants to maintain their drain. Clearly, unless the award can be regarded as valid, the work done under it was unauthorised. I agree with the learned trial Judge that, under the circumstances here, the engineer had no jurisdiction to order or compel the railway company to execute any part of the work or to direct that the water of the award drain should be discharged upon their lands, and I am of opinion that in so far as it professes to affect them, it has no force.

The question then arises, is the award valid in respect of the other parties affected by it? I do not think it is. The plan or scheme contemplated by it, as I have already pointed out, was to conduct the water to the railway lands by the construction of a culvert across the highway. This culvert was essential to the proper carrying out of the scheme; without it water in greatly increased quantities

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LISTER, J.A.

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LISTER, J.A.

would necessarily be discharged into the road drain, which was manifestly incapable of carrying it off without damage to lands to the east, and that such in fact was the result is established.

The award being invalid, the work done under it was unauthorized. The payment by the defendants for a part of the work and construction by them of the culvert is, I think, evidence that they not only permitted but adopted an unauthorized work on the public highway as part of their drainage system—a work which obviously would, and in fact did, cause damage for which they are, in my opinion, liable.

It may be noted that Bailey's requisition was for a drain on his own land, while the award directs the drain to be made wholly upon the highway. How far this affects its validity it is not now necessary to decide.

I also agree with the learned trial Judge that the defendants have no remedy over against the railway company.

Reference may be made to *In re McLellan and Chinguacousy* (1900), 27 A.R. 355; *Ward v. Caledon* (1892), 19 A.R. 69; *Fitzgerald v. Ottawa* (1895), 22 A.R. 297.

I think the appeal should be dismissed.

MACLENNAN, and MOSS, JJ.A., concurred.

*Appeal dismissed.*

R. S. C.

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## YOUNG V. OWEN SOUND DREDGE COMPANY.

*Negligence—Evidence—Onus of Proof.*

In an action to recover damages for death caused by alleged negligence, the onus is on the plaintiff to prove not only that the defendant was guilty of actionable negligence, but also, either directly or by reasonable inference, that such negligence was the cause of the death.

Where, therefore, a man employed on the defendant's tug was drowned, and it was shewn that wood had been piled upon the tug's deck in such a way as to make it dangerous to pass along the deck, but it was also shewn that there was a safe passage-way on a scow lashed to the tug, and there was no evidence whatever as to the cause of the accident, the action was dismissed.

Judgment of BOYD, C., reversed.

APPEAL by the defendant Horsey from the judgment at the trial.

Statement.

The following statement of the facts is taken from the judgment of LISTER, J.A.:—

The plaintiff brought the action under the Fatal Accidents Act, on his own behalf as father, and on behalf of the mother, of Thomas Young, deceased, and as administrator of the estate of his son, against the Owen Sound Dredge Company and Edward Henry Horsey, to recover damages under "The Workmen's Compensation for Injuries Act" for his son's death, alleged to have been occasioned by the negligence of the defendant Horsey. The material allegations in the statement of claim are that the death of Thomas Young was caused by the negligent acts and omissions of the defendant Edward Henry Horsey, his servants and agents, while using a tug-boat called "The Rover," the complaint being as follows: "The said defendant had negligently and improperly caused to be piled upon the decks and in the passage-ways round the cabin of the tug-boat 'Rover' a large quantity of slabs which were intended to be used as fuel in the furnaces of the said boat. The said passage-ways were piled to a height of about four feet above the railing of the said boat, allowing only the railing of the said boat, being a space of about eight inches in width, for those who were obliged to pass



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from the forward part to the back part of the boat or *vice versâ*, making the passage extremely dangerous, particularly when the boat was in motion; that on the morning of the 13th day of June the said deceased was in the engine-room receiving orders from the engineer, to whose orders he was obliged to conform, and in compliance with same attempted to pass from the engine-room to the forward part of the boat, where the furnaces of the said boat are situated, and while so attempting to pass along the right side of the boat and upon the aforesaid railing, he slipped and fell into the water and was drowned, and the plaintiff says that the said ways of the said defendant E. H. Horsey were defective in their condition and arrangement."

The defendant Horsey, by his statement of defence, denied generally the allegations in the plaintiff's statement of claim, and specifically that the death of the deceased was caused by any negligent act or omission of the defendant, his servants or agents, on the tug-boat, or by the improper piling of cordwood thereon or therein, and he pleaded, *inter alia*, contributory negligence on the part of the deceased, and also that: "It is not known how, why, or from what part of said tug-boat the said Thomas Young went overboard, and if he fell off the starboard side of said tug-boat as is alleged by the plaintiff, he did so, not while in the discharge of his duties, but while absent from the same, and he was careless as to his manner of going, and he knowingly and willingly incurred the risk of passing on the starboard side, whereas he might have gone on the port side from the engine-room of said tug-boat forward, or *vice versâ*, by walking on the deck of the dredge, which dredge was lashed fast to the said tug-boat and the deck of which was level with the rail of said tug-boat."

The accident occurred between seven and eight o'clock of the morning of the 13th of June, 1899; a fine, calm morning. The deceased had been working for the defend-

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ant Horsey for some months before the accident as fireman on board the tug "Rover," which, at the time of the accident, was lashed to the starboard side of a dredge owned by the defendants, the Owen Sound Dredge Company, and was engaged in assisting the tug "O'Brien," which was ahead of and connected with the dredge by a tow line, to tow the dredge and her two scows from Owen Sound to Byng Inlet, on the Georgian Bay, a distance of some eighty miles. The tow was proceeding at the rate of about five miles an hour. Before leaving Owen Sound a quantity of cordwood required for fuel for the tug had been piled along the passage-way on either side of the engine-house between the doors, near the end of the engine-house, and the doors behind the pilot-house leading to the fire-hold, a distance on each side of the engine-house of twelve feet. The evidence was that it was solidly piled to a height of nearly four feet from the deck, and kept securely in place by slabs—about two feet apart—placed in an upright position between the rail of the tug and the cordwood; the ends of the slabs projecting about four inches above the top of the wood, affording, as a witness described it, a "hand-hold" to a person walking along the rail; and that this was the usual and necessary method of loading cordwood on tugs such as the "Rover" when going on a long trip.

It was also in evidence that the top of the rail was one foot seven inches from the deck, ten inches wide and slightly bevelled on the edges. It appeared that shortly before the accident the deceased was in the engine-room talking to the engineer, who suggested that he should go to the fire-hold and "shake up" the fire in the furnace, and that he left the engine-room with the intention of doing so. He might, without any danger, have reached the fire-hold by walking forward on the starboard passage-way of the dredge. He did not, however, attempt to go that way. He either went round or passed through the

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starboard door of the engine-house to the starboard side of the tug.

James Brennan, who was sitting on the port rail of the tug about four feet to the rear of the engine-house, was the last person who saw him before, and the first person who saw him after, the accident. He testified that he saw the deceased standing at the starboard corner or back of the engine-house and that in about ten minutes later, hearing a faint cry, he looked back and saw him in the water swimming some five or six feet astern of the tug; that he immediately gave an alarm, and that before assistance could reach him he was drowned. No one saw the accident, and there was no evidence to shew how it occurred. There was evidence that he could have reached the fire-hold in a couple of minutes by walking either on top of the wood piled in the passage-way—which the evidence shewed was a safe way—or along the railing, which many of the witnesses testified could with reasonable care be safely used as a way in going from one end of the boat to the other.

It would seem from the evidence of Irwin, the engineer, that the deceased did not, on that occasion, get to the fire-hold. As to this, Irwin, in answer to the question: "You saw the fire-hold afterwards?" said, "Yes, and there were four or five sticks in the fire-hold. He was never in the fire-hold after he left me until I heard the report." There was some evidence that the deceased was incautious or careless; that on one or more occasions he had been warned against dozing while sitting on the rail of the tug.

The action was tried at Owen Sound on the 6th of March, 1900, before BOYD, C., and a jury.

A motion for a nonsuit made at the close of the plaintiff's case, and renewed at the close of the defence, was refused. No questions were submitted to the jury, but the learned Chancellor, at the close of his charge, told them that if they should conclude that the defendant Horsey was liable he would ask them to state in what respect they

thought he was to blame for the accident; and the jury, having found for the plaintiff, stated "that the accident was caused by reason of the wood having been piled up in the passage-ways unnecessarily." The learned Chancellor thereupon directed judgment to be entered for the plaintiff for \$300, the amount assessed by the jury.

Statement.

The action was dismissed as against the company, who had given notice under the Act that they were not employers.

The appeal was argued before ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, J.J.A., on the 5th of October, 1900.

A. G. Mackay, for the appellant.

W. J. Hatton, for the respondent.

November 13th, 1900. ARMOUR, C.J.O.:—

I think that the appeal must be allowed and the action dismissed, but only because I am compelled to do so by the decisions of the Supreme Court in *Canadian Coloured Cotton Mills Co. v. Kervin* (1899), 29 S.C.R. 478, and other cases, which go far beyond the case of *Wakelin v. London and South Western R. W. Co.* (1886), 12 App. Cas. 41, upon which they were supposed to be based.

OSLER, J.A.:—

I think the appeal of the defendant Horsey must be allowed. I rest my judgment upon this: that the evidence fails to shew how the unfortunate young man fell off the boat. It is not necessary to invoke the decisions of the Supreme Court in the cases of *Montreal Rolling Mills Co. v. Corcoran* (1896), 26 S.C.R. 595, or *Canadian Coloured Cotton Mills Co. v. Kervin* (1899), 29 S.C.R. 478. The onus was upon the plaintiffs to prove some negligence on the part of the defendant causing, or conducing to, the accident. What was relied



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OSLER, J.A.

upon was that there was a defect in the ways to be traversed by the deceased in doing his ordinary work on the tug and that it was such defect which caused him to fall overboard. But the evidence falls altogether short of proving that it was in the use of such way or ways that he did so. So far as the facts found admit of any inference on the subject they are opposed to that view, and the case is one *a fortiori* for the application of the decision in the House of Lords in *Wakelin v. London and South Western R. W. Co.* (1886), 12 App. Cas. 41. No one can say how the accident happened. It may have been while using the way, either passing over the firewood piled in the passage or in walking along the rail, or it may have been that he slipped off elsewhere and not while using either of these ways. No one can tell. Therefore, negligence causing the accident is not proved. Whether in point of fact these ways were under the circumstances defective or dangerous is extremely doubtful, but it is not necessary to say anything as to that.

The appeal must, therefore, be allowed and the action dismissed.

LISTER, J.A.:—

In order to entitle to recovery in an action like this it must be affirmatively shewn, not only that the defendant was guilty of actionable negligence but that such negligence occasioned the injury complained of. It is not enough to merely prove that the defendant was negligent. It may well be that a defendant has been negligent and yet the injury complained of not due to such negligence. The onus is on the plaintiff to establish by proof negligence on the part of the defendant to which the death of the deceased is attributable.

The rule on the question of onus, as relating to the cause of an accident, is laid down by Lord Halsbury, L. C., in the leading case of *Wakelin v. London and South*

*Western R. W. Co.* (1886), 12 App. Cas. 41, at p. 45, in these words: "That is the fact to be proved. If that fact is not proved the plaintiff fails, and if in the absence of direct proof the circumstances which are established are equally consistent with the allegation of the plaintiff as with the denial of the defendants, the plaintiff fails, for the very simple reason that the plaintiff is bound to establish the affirmative of the proposition '*Ei qui affirmat non ei qui negat incumbit probatio.*'" The facts in that case were these: The dead body of a man was found on the line of the railway near the level at night, the man having been killed by a train which carried the usual head-lights but did not whistle or otherwise give warning of its approach. No evidence was given of the circumstances under which the deceased got on the line. The jury found for the plaintiff (the widow and administratrix of the deceased). It was held that even assuming (but without deciding) that there was evidence of negligence on the part of the company, yet there was no evidence to connect such negligence with the accident; that there was, therefore, no case to go to the jury, and that the railway company were not liable.

Judgment.

LISTER, J.A.

In *Montreal Rolling Mills Co. v. Corcoran* (1896), 26 S.C.R. 595, where the plaintiff's husband was accidentally killed whilst employed as engineer in charge of the defendants' engine and machinery, no one saw the accident; the evidence left the manner in which the accident occurred a matter of conjecture. It was held that in order to maintain the action, it was necessary to prove that the accident was actually caused by the neglect of the defendants, and such proof being entirely wanting, the action was dismissed.

In *Canadian Coloured Cotton Mills Co. v. Kervin* (1899), 29 S.C.R. 478, the same point arose. The deceased was killed by being caught in a revolving shaft and dashed against a beam. No one saw the accident and it could not be ascertained how it occurred. The negligence

Judgment.  
LISTER, J.A.

charged was want of a fence or guard around the machinery which caused his death, contrary to the provisions of "The Workmen's Compensation for Injuries Act." It was held (Mr. Justice Gwynne dissenting), that, whether the omission of such statutable duty could or could not form the basis of an action, the plaintiffs could not recover in the absence of evidence that the negligence charged was the cause of the accident. Mr. Justice Girouard, who delivered the judgment of the majority of the Court, said: "As in *Montreal Rolling Mills Co. v. Corcoran*, there is no witness to tell how the accident happened. . . . Upon the authority of *Wakelin v. London and South Western R. W. Co.*, we decided that all cases of this kind involve the determination of two essential facts: 1st, negligence on the part of the master; and, 2nd, that the negligence was the cause of the injury to the employee. Without satisfactory evidence of both these facts, there is no case to go to the jury."

I refer also to the observations of Lord Chief Justice Coleridge in *Smith v. Baker* (1889), 5 T.L.R. 518, where he is reported to have said: "If there were five hundred acts of negligence, and none of them caused the injury to the plaintiff, such acts of negligence would not give a cause of action. Here it was left wholly in doubt as to how the plaintiff was injured. It was the plaintiff's duty to make that clear."

Then, applying the rule to the facts of the present case, it seems to me there can be no recovery. All that the evidence clearly establishes is that the deceased met his death by drowning. No one can tell how he got into the water.

The witness Brennan testified that there was an interval of about ten minutes between the time he last saw the deceased on the tug and the time when he first saw him in the water; and there was evidence that it would have taken about two minutes to get to the fire-hold. What was the deceased doing during all that time?

What evidence is there that he attempted to walk along the railing? Is it not quite as reasonable to conjecture that he walked along the top of the wood piled in the passage-way? Can it upon the evidence be said that the accident did not happen by reason of the deceased's own negligence after he had passed to the forward part of the tug?

Judgment.  
LISTER, J.A.

Adopting Lord Watson's observations in *Wakelin v. London and South Western R. W. Co.* (1886), 12 App. Cas. 41, at p. 49, the evidence affords ample materials for conjecturing that the death may possibly have been occasioned by the alleged neglect, but it furnishes no data from which an inference can be reasonably drawn that, as a matter of fact, it was so occasioned.

I am of opinion that the appeal must be allowed and the action dismissed.

MACLENNAN, and MOSS, JJ.A., concurred.

*Appeal allowed.*

R. S. C.

# KELLY V. DAVIDSON.

*Master and Servant—Workmen's Compensation for Injuries Act—Negligence—Foreman—Evidence.*

AN appeal by the defendant from the judgment of a Divisional Court [BOYD, C., FERGUSON, and MEREDITH, JJ.], noted 32 O.R. 8, reversing the judgment at the trial of MACMAHON, J., reported 31 O.R. 521, was argued before ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 8th of October, 1900, and on the 16th of October, 1900, was dismissed with costs, the Court agreeing with the Court below in holding that there was some evidence to support the finding of negligence.

Statement.

*Clute*, Q.C., and *A. R. Clute*, for the appellant.

*H. E. Irwin*, and *S. B. Harris*, for the respondent.



## HOPKINS V. HOPKINS.

*Fraud—Undue Influence—Husband and Wife.*

Held, upon the evidence in this case, affirming the judgment of a Divisional Court, that the transfer of property in question was executed by the husband under the undue influence and coercion of the wife and without independent advice, and was rightly set aside.

**Statement.**

APPEAL by the defendant from the judgment of a Divisional Court.

The action was brought on the 24th of August, 1899, to set aside a transfer of three hundred shares in the capital stock of the Canadian Bank of Commerce made about one month before by the plaintiff to his wife. It was alleged that the transfer had been procured by undue influence and duress, and that it was improvident.

The plaintiff and the defendant were married in June, 1892. A short time after the marriage the plaintiff bought three hundred and seventy-five shares in the capital stock of the Canadian Bank of Commerce, giving seventy-five of them to his wife. He also, a few months later, made a will leaving her all his bank shares, a large sum of money, and several valuable parcels of real estate. The relations existing between the plaintiff and his wife subsequently became unhappy, and in February, 1899, she insisted against his remonstrances on paying a visit to Washington, and while she was there he made another will, the gifts to her being very much reduced. She heard of this will upon her return, and in April, 1899, a third will was drawn at her instance giving her almost the same benefits as those given by the first will. This will was drawn by Mr. Currie, Registrar of Deeds of the County of Lincoln, who, while he was in practice, had sometimes acted as the plaintiff's solicitor. In July, 1899, the impeached transfer was made, Mr. Currie again being called in to carry it out. A few days after the transfer had been completed a violent quarrel took place, and a

separation was agreed to, the wife receiving \$6500 and releasing her dower. She was represented in this transaction by her solicitor, Mr. German, and Mr. Currie again acted for the husband. The facts throwing light upon these transactions and upon the relations of the parties are given in detail in the judgments.

The plaintiff died before the action came on for trial, having, however, been examined *de bene esse*. He had made another will, leaving a large share in his estate to his sister, who revived and carried on the action. It was tried at St. Catharines, on the 23rd of October, 1899, before FALCONBRIDGE, J., who dismissed it with costs, basing his judgment mainly on the evidence of Mr. German and Mr. Currie, and saying that to hold against the validity of the transfer would be to disbelieve their testimony. But on the plaintiff's motion, the majority in the Divisional Court took the other view, and on the 14th of May, 1900, set aside the transfer, the judgments in favour of and against the motion being as follows:—

BOYD, C.:—

The original plaintiff and the defendant were married in 1892, and in March, 1893, he made a will largely in her favour, and, as the husband says, at her dictation. She kept this will, and he did not afterwards accurately know its contents. About 1896 the husband was taken with the illness of which he died in October, 1899, heart disease, which became complicated with dropsy, causing great bodily discomfort and some weakening of the mental faculties, and then gradually reducing his system. He thus became confined to the house, and finally for over three months to his bed.

In February of 1899 his wife, against his remonstrances, and when he was very ill, left him to visit Washington. She was absent some three weeks, and during the interval the husband, finding she had so little

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BOYD, C.

regard for him, changed his will and had one drawn by the witness Kanold, which he himself dictated (with no interference from his relatives, as appears by the evidence, although his wife suspected such interference).

Mrs. Hopkins returned from Washington about the middle of March, and soon after made a few days visit to Buffalo. Having discovered about the new will being executed, she made a very great and alarming disturbance at home. The details are spoken of in the same terms by several witnesses, Dr. Black, Susan Snider and Mrs. Darbinder. I think the fair result of the evidence was that the husband was utterly cowed by her violence, and was willing to do anything to be left in peace. He was, upon the unquestioned evidence of several witnesses, "afraid of her," and apparently not without reason. His age was then 76 and hers 43. The end of this outbreak was that the Kanold will was burnt and a will drawn to suit the defendant through the agency of Mr. Currie, which is dated the 6th of April, 1899. I think it is correct to say, as put by the defendant, that "she sent for Mr. Currie to come." Thus things were straightened out satisfactorily, as the defendant expresses it. She says that after this peace and harmony prevailed; but those in the house do not draw this picture.

The next important transaction is the one impeached, the transfer of three hundred shares of bank stock, worth some \$23,000, to the defendant, on the 19th of July, 1899. Between March and July we have only general evidence. In April the defendant shuts out the plaintiff's sister, Mrs. Upthegrove, slamming the door in her face. In May the same method of exclusion is practised on the adopted daughter of the plaintiff, Mrs. Ida Armstrong. A servant who was there from May to July (Lydia Franklin), says they lived very unhappily together—constant quarrelling between them. The wife kept a revolver in her bed, and would not allow any of her husband's friends or relatives to come into the house. Mrs. Darbinder was in attendance

on the sick man till the 15th of May, and corroborates the domestic servant. The husband told her he was afraid of his life because of his wife, that he had to do just as it would please her, and her testimony is that he was in fact afraid of her. The medical man was changed in April; Dr. Black, who was apparently more sympathetic towards the plaintiff, being superseded by Dr. Neff. Dr. Neff testifies that Hopkins had a strong will prior to his illness, that he was confined to bed from June till his death in October. He thinks that Hopkins was capable of doing business in July, and was scarcely so much weakened by disease that he could be influenced. He and other witnesses agreed that Hopkins was far from being a liberal man, his reputation was the other way, *i.e.*, pretty close in money matters. Mr. Currie speaks of him as "a saving man, good in getting money and in adhering to it, a somewhat grasping man. I never heard of his exercising generosity."

Judgment.

BOYD, C.

Between March and July the wife had been speaking of separation—had offered to leave Hopkins, her husband, to his sister and friends if he would give her two hundred shares of the bank stock. When this offer was broached, the plaintiff says he laughed at the idea.

There was a minor transaction in June which throws light on the relative situation. The plaintiff was minded to give \$6,000, in a deposit receipt, to his sister, but did not endorse it. When it was sent to him afterwards to be signed, Hopkins says he knew, if he did so, the wife would shoot him. So it was suggested by his wife that he had better build a mausoleum with the money, and that was carried out between Mr. Currie, Munro the builder, and his wife. The defendant says it was the husband's own notion to do this, but that is contrary to the bulk of the evidence and the likelihood of events. It is a thing the husband did not need, as he himself explains, and it was not a likely object in which he might invest some money for himself (according to the wife's version). Some stress is laid upon



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BOYD, C.

the benefits obtained by the sister, but it occurs to me that the explanation is, she won by kindness, the wife extorted by violence.

Having failed in getting two hundred shares, how is it that the defendant succeeds in getting the whole of the stock, viz., three hundred shares? According to the wife, the gift originated with the husband, and his reason, as she puts it, is that if it was in her hands her mind would be contented. Further he said: "‘You will have hay fever in a short time, and you will have to go away. I am going to transfer the stock to you now. You will promise me you will do everything right.’ I said ‘I do not want Mrs. Upthegrove to come here. You send for Mr. Currie, I want him to do my work.’" It may be these last words are meant to be attributed to the husband, but, as reported, they are the utterance of the wife's wishes. However, I have little doubt that Mr. Currie understood what the wife desired, and that he said nothing in the way of advising the husband, as should have been done by an independent solicitor in the premises.

Mr. Currie gives a different account of the motive of the plaintiff; the plaintiff said to him that "he had made up his mind to assign the three hundred shares to his wife, and for the reason that he had willed it to her, and it would only be for two or three months (? before he died) and she might as well take the deed for it now." Mr. Currie admits that it was on the same occasion when he was sent for that the husband spoke of wanting to have his sister come to him, but his wife refused and said she would not receive her, and at length the wife finally agreed to let her come if she got a transfer of the stock. The account given for the defence lets light into the affair, and shews how the old man was worked upon or induced to do instanter that which might not have been done otherwise. The telegram sent by Mr. Currie to the sister speaks of the situation thus: "Brother very sick, desires you to come." The sick man had a bad turn; he yearned for more kindly

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BOYD, C.

attendance, but he could only get it on the wife's terms. Considering the age of the plaintiff, his debility from illness, his growing fear of the defendant, his desire to have his sister beside him, it became the duty of Mr. Currie to protect him against the importunity of the defendant. There can be little doubt that her mind was not contented until she had secured this stock, and little doubt that she urged the matter till all resistance ceased, and the old man became passive in her hands. If he was able to understand, why was it not pointed out to him that he might not die so soon as he expected—that, even if he were to die soon, it would be perfectly safe to leave the stock as it was in the will, and that if he once transferred the stock absolutely, he could not get it back again? Some condition is pointed out in the expression given by the wife, “You will promise me you will do everything right.”

Upon the authorities there appears to be quite insufficient care taken to see that the donor understood what he was doing, and to guard him from acting improvidently and from surrendering weakly to the clamour of his wife.

In the account given by the plaintiff himself this whole scene appears to be a blank; he remembers up to the mausoleum affair, and also about the subsequent separation deed; but as to this transfer he says the mystery comes in as to the three hundred shares. But he is decided in this, that he never dreamed of transferring these to his wife, they were too precious to him, he would not disturb them. After hearing how the matter was carried out by power of attorney, he said in August that he was going to give his wife a wrestle for that money she had taken, and that he knew nothing about it. And on the 24th of August, 1899, the writ was issued by him.

From the account given by Mrs. Upthegrove, who saw him on the 22nd of July, he was in an extremely low condition; she thought he was dying, and he lay in a stupid condition for days afterwards. He may have been roused

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BOYD, C.

to do this piece of business, but have forgotten all about it when the occasion passed. Altogether, it is not a transaction which, in my judgment, should stand. The intervention of Mr. Currie gave no assistance to the alleged donor; he did no more than give the matter legal form, and was not there as the adviser of the person who needed advice.

It is noteworthy that the evidence given by the witness Dowd is not contradicted. He says that, in the presence of the defendant, on the 27th of July, the plaintiff said: "I am afraid of my wife, of that woman there; she has an ungovernable temper, and in one of her tantrums she might shoot me. I am like a prisoner in gaol. I want somebody to protect me. I cannot see any of my friends. I have to do what she wants me to do. I cannot do what I want myself." She did not deny this, but intimated that his head was wrong, that he was in delirium, but, says Dowd, he was not, he was far from it.

If this transaction cannot stand by itself (as I think it cannot) it derives no adequate support from what happened during the settlement of the separation deed in August.

According to Mr. Currie's evidence "the bank shares were not in question at all during that time; the stock was not referred to in my presence." Mr. German, who was acting for Mrs. Hopkins, was allowed to see the plaintiff, alone, and it was then, as he says, that the three hundred shares were mentioned by the plaintiff. That is most emphatically contradicted by the plaintiff, Hopkins, and I think there is good reason to believe that the transfer of these shares was not then in his mind and had not been realized by him. The reference to the stock spoken of by Mr. German is quite inconsistent with the knowledge the plaintiff had of the transaction as given by Duncan Armstrong. The evidence for the defendant falls short of shewing that the transfer of the stock was understood and ratified by the plaintiff in such a manner as would be necessary under the circumstances of the transfer. Not a

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BOYD, C.

word was spoken on the subject to Mr. Hopkins' alleged adviser, Mr. Currie, and the allusion to stock spoken of by Mr. German may well be explained, as the plaintiff explains it, by reference to the seventy-five shares which had been given before by the plaintiff to his wife. His whole estate was worth in all \$60,000 or \$70,000; she has received from him \$15,000 of unquestioned benefits, and also \$22,500 now impeached. This last gift would be relatively a large sum, the bestowal of which as claimed would be improvidence.

The salient points may be thus grouped:—

1. Between husband and wife was great disparity of years and strength—he 76 and of greatly impaired health owing to debilitating and increasing disease.

2. His natural disposition of acquiring and keeping money disappears under the insistence of his much younger wife.

3. Much uncontradicted evidence to shew he was in fear of her, sought to be protected from her, and was willing to purchase peace and quietness by dealing with his property as she wished.

4. She kept him (confined as he was to house and afterwards to bed) under surveillance and refused admittance to his friends and relatives.

5. His capacity for business and his understanding were considerably weakened at the time of the transfer, and he was admittedly in distress and "very sick." He desired to have his sister beside him, but this was refused unless he would consent to transfer the stock.

6. He had no competent adviser; Mr. Currie, if not the choice of the wife, was acceptable to her, and did nothing to enable the plaintiff to act independently of his surroundings.

7. The plaintiff himself takes speedy action to vacate the transfer on being advised of what had happened, and is also able to give intelligent evidence in support of his case before his death.



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BOYD, C.

8. No consideration was had as to the gift of the stock as a factor entering into the separation; the plaintiff was not advised about it, and no attention called to it as one of the terms. What Mr. German understood about the stock was not what the husband understood, and the onus is on the defendant to support the gift by retroaction.

9. It is the case of an old man, lonely, terrified, and very sick, overborne (contrary to his natural bias of acquisition) by the threats and violence and importunity of an unsatisfied woman, against whom no check was interposed by the person who drew the papers.

Upon the whole transaction I cannot conclude that he was a free agent.

The judgment should be reversed, and the property restored to the testator's estate, according to his last will, which is, as I understand and as was alleged at the bar, later than that of April, 1899. Costs follow result.

See *Parfitt v. Lawless* (1872), L. R. 2 P. & D. 462; *Hughes v. Wells* (1852), 9 Ha. at p. 765; *Moxon v. Payne* (1873), L.R. 8 Ch. 881; *McCaffrey v. McCaffrey* (1891), 18 A.R. 599; *Cooke v. Lamotte* (1851), 15 Beav. 234.

ROBERTSON, J.:—

I fully concur in the judgment just read.

MEREDITH, J.:—

There is a good deal to be said in support of the gift in question, even if that transaction stood alone; it was not an improvident transaction, the husband had abundance left for the short time which, as he seemed to know, he had then to live; it was not an inofficious transaction; if the gift be set aside, the husband's sister, without any special claim or right, will get the benefit of that which is taken from the widow; the husband was of sound mind, and had abundance of time for considering that which he was doing, and unquestionably knew the nature, extent,

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MEREDITH, J.

and effect, of his act; and it was done by him with the assistance of, and through, his former solicitor, and his then, and for many years before, adviser, Mr. Currie, the Registrar of the County of Lincoln; and was, as the husband then stated, but anticipating by a short time the provisions which he had made for his wife in his last will. I fail to see any great evidence of "terrorism" and there is none of "wheedling," on the part of the wife; the facts, not the mere gossip in the case, seem to shew that much the usual state of affairs existed between husband and wife as in a proportion of other cases where an old man marries a comparatively young woman: *Barron v. Willis*, [1899] 2 Ch. 578; \* *Gardner v. Gardner* (1839), 22 Wend. 526.

But, however that might have been had the husband elected to avoid the gift, unless we are to discredit the testimony of the witness, Mr. German, it cannot now be avoided, for in the separation transaction, between husband and wife, the husband, instead of electing to avoid it, expressly recognized the validity of it, and ratified and affirmed it, in obtaining that agreement upon the faith of it.

The later transaction was negotiated with deliberation, whilst the parties were at arms length, embittered the one against the other, Mr. Currie acting for the husband, and Mr. German for the wife. There is no suggestion that this transaction is avoidable, and it was acted upon and fully carried out, during the husband's life time.

That there may be no doubt or misunderstanding as to Mr. German's evidence, I will now read the more material parts of it:—"Q. Did you see Mr. Hopkins during the negotiation of these terms? A. Mrs. Hopkins and I were down stairs; I had Mrs. Hopkins' proposition; what she would do and separate. Mr. Currie came down and said Mr. Hopkins will only give \$5,000. I said we could not accept that at all; Mrs. Hopkins is willing to take what is

\* Reversed in appeal: [1900] 2 Ch. 121.—Rep.

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MEREDITH, J.

in the will; she was willed the homestead house and lot and \$5,000 in money, and all the bank stock. That was in the will. I went up stairs then. Mr. Currie suggested to me you had better go up and see Mr. Hopkins, and see what you can do with him. I went up and I said to Mr. Hopkins, do you want to get this settled up, and not be quarrelling all the time; Mrs. Hopkins will accept what she had by the will, and she will consent to a deed of separation then, and that will end it. He said I have dealt very liberally with her now; I have given her the bank stock. This is the first time I knew of it. He mentioned the three hundred shares. I knew she had seventy-five. He said I will give her \$5,000 more if she is willing to take it and separate. I said she will not do that; she wants the property; he said no, not as long as I live. Well, I said, give her \$15,000 besides the stock she has got and she will do it. He said no, she (? I) will not do it. I went down and told Mrs. Hopkins he would not give her the house and lot, but he would give her \$10,000 in lieu of it. Mr. Currie went up stairs again. I went up after him. We were up and down four or five times. He says to me, send for Mr. Currie and whatever he says I will do. I sent for Mr. Currie. Mr. Currie said, it is your property; you can do as you like with it; I will not advise you. It was then agreed she should take \$5,000; that is the whole concern. As far as the stock is concerned, I certainly would not have advised her to sign that separation deed without getting the stock. He had a large quantity of real estate; her dower interest would be worth more than \$6,500. I asked her if she had the bank certificate; I wanted to ascertain whether it was in a position to be legally held by her; otherwise it would have been mentioned in the deed of separation; she had the certificate, and it did not require to be mentioned in the deed of separation. Q. You were satisfied the stock was vested in her? A. Yes."

If that be true, it is decisive of the case against the plaintiff. There can be no escape from that. We must discredit that testimony, or dismiss the action. The learned trial Judge, having seen and heard the witnesses, gave credit to it; I can perceive no good reason for differing from him in that respect; on the contrary, I entirely agree with him in it.

Judgment.  
MEREDITH, J.

What good reason can be advanced for discrediting the witness? I have heard none, nor can I imagine any. What object to be gained, by a man in his position, giving such false testimony? The suggestion seems to be wholly unwarranted by anything appearing in evidence in the case.

And the probabilities are against it, are altogether in accord with his testimony.

The stock had been deliberately transferred to the wife, and stood in her name; subject to her disposal at any moment. No one had suggested that the gift could be avoided. It was a very recent matter, and must have been present to the minds of the parties and of Mr. Currie. If the wife were not to retain the stock, provision would have been made for its re-transfer. If nothing had been expressed upon the subject, might it not well be found as a fact, that it was the tacit agreement, of all parties, that the wife was to retain that which she already had, and get the additional benefits in consideration of the separation and the release of her dower? The parties were substantially carrying out, or agreeing in reference to, the provision made for the wife in the husband's will, which gave her this stock.

Whatever may be thought of the wisdom or unwisdom of the husband's acts, I can have no manner of doubt of the intention of all parties, that the wife was to retain the stock as well as get the other property given to her, upon the separation; or, in other words, that Mr. German's evidence is a true account of the later transaction.



Judgment.  
MEREDITH, J.

I do not understand it to be adjudged that this transaction was effected by duress or other oppression; but whether or not, a marshalling of the forces on each side may not be without use; there were on the husband's side an old but somewhat self-willed, if of varying moods, man; his sister, the present plaintiff; his son; and his adopted daughter and her husband; and apparently, the village gossips, together with the weighty "semi-official" (as he designates it) and wholly self-imposed countenance and protection of the village constable; and there were on the wife's side, herself, a somewhat hysterical woman, apparently without any relatives or aiding friends, and a reputable solicitor.

Our right to interfere must be based upon fraud, in some of its numerous and varying forms, whether called constructive fraud, or legal fraud, or interference on grounds of public policy, or undue influence, or by any other phrase; we have no mere intermeddling jurisdiction.

It seems to me that it would be a fraud upon the defendant to set aside the first transaction, upon the faith of which the second was entered into and carried out, and allow the latter to stand.

I would dismiss the motion.

The appeal was argued before ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 21st and 24th of September, 1900.

*Robinson, Q.C.*, and *Teetzel, Q.C.*, for the appellant.

*W. M. Douglas, Q.C.*, for the respondent.

November 13th, 1900. The judgment of the Court was delivered by

ARMOUR, C.J.O.:—

Great stress was laid upon the judgment of the trial Judge in argument as a finding of fact which should not have been interfered with by the Divisional Court, but with great respect I do not think that the judgment of

the learned trial Judge really determined the essential question to be determined, namely, whether the gift of the stock in dispute was the spontaneous act of the donor, acting under circumstances which enabled him to exercise an independent will, and that the gift was the result of a free exercise of the donor's will.

Judgment.  
ARMOUR, C.J.O.

It was unnecessary in determining this question to hold that either Currie or German was deliberately telling what was untrue, and it was erroneous to say that they were substantially in accord as to what took place on the occasions referred to, and as to the instructions of the testator.

For German was not present when the power of attorney to transfer the stock was executed, and Currie was not present when, as German alleges, Hopkins made the statement which is put forward in support of the gift.

And Currie's evidence as to what took place at the time the power of attorney to transfer the stock was executed goes far to shew that undue influence was used to procure the execution of it by Hopkins, and the evidence of German, apart from the statement he alleges that Hopkins made as to the stock in question, goes far to shew that the benefit the defendant derived from the deed of separation was also procured by undue influence.

But we are not concerned with the judgment of the learned trial Judge but that which overruled it, and the latter we ought to affirm unless we are satisfied of its error. *Symington v. Symington* (1875), L.R. 2 Sc. App. 415, 424; *Hale v. Kennedy* (1883), 8 A.R. 157.

And so far from being satisfied of its error I am entirely satisfied with its correctness, both in law and fact. It is not pretended that Hopkins treated his wife otherwise than with kindness and affection, but it is plain that she grossly illtreated him, and I can draw no other conclusion from the evidence but that she had acquired such an influence over him, had inspired him with such a dread of her, and had obtained such a control over him, as to

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ARMOUR, C.J.O.

preclude the exercise by him of his free and deliberate judgment, and that it was by the use of such undue influences that the power of attorney to transfer the stock in dispute was procured.

The onus of proving that a gift obtained under such circumstances was the spontaneous offspring of a free and unbiassed mind lay upon the defendant, and it was essential to the validity of a gift obtained under such circumstances that the donor should have had competent and independent advice, but he had none.

Currie was not a solicitor, and it is very doubtful if he was present in the interest of the husband and not in that of the wife, but in whatever capacity he was present he gave no advice whatever to Hopkins, and his evidence shews the control that the wife was then exercising over the husband in refusing to consent to allow his sister to come to see him unless he would agree to execute the power of attorney to transfer the stock, which he was obliged to do, before she would consent.

Hopkins was examined as a witness on the 22nd of September, 1899, and the power of attorney was executed on the 19th of July previous, and although he remembered very distinctly all the other transactions between him and his wife, he had no recollection whatever of this transaction, and did not believe that he had ever transferred this stock to his wife.

The parties must have been aware at the time of the trial of his evidence in this respect, and although Mrs. John Armstrong was a subscribing witness to the execution by Hopkins of the power of attorney, she was not called as a witness in support of it, nor is any reason given why she was not called.

The will of the 16th of March, 1893, and the will of the 6th of April, 1899, were both put in evidence in support of the gift.

As to the former, Hopkins swore that it was drawn by Currie in his wife's presence, and that she dictated it, and this was not denied. Judgment.  
ARMOUR, C.J.G.

As to the latter, it was plainly the result of coercion on the part of the wife.

In the negotiation for the separation Currie was ostensibly acting for Hopkins; I say ostensibly for it does not appear that he gave him any advice, and German says that Currie said to Hopkins: "It is your property; you can do as you like with it; I will not advise you." German was acting for the defendant.

Hopkins was at that time confined to his bed, so ill that he signed the separation deed as a marksman; he had no competent or independent advice; his relatives were not allowed by his wife to see him; she was still in the house with him; he was practically without any advice or assistance in the negotiation.

On the 27th of July, Duncan Armstrong, hearing that Hopkins wanted to see him, went to the door but was refused admittance by the defendant. He asked her if German was there, and she said yes, and German came to the door, and he told German that there was something radically wrong being done when he was not allowed to see him; then German told him he had better stay out for a few days until they got things fixed up, and he was not allowed to see him. German does not attempt to contradict this.

It was during this negotiation that German says that Hopkins told him that he had transferred the stock in question to his wife. Currie was not present at the time, and it is singular that German did not mention this to Currie.

If the defendant was present at the time she does not corroborate German's statement, and Currie swears that this stock was never mentioned during the negotiation.

After the separation, Duncan Armstrong went to see Hopkins and said to him: "They tell me down town that



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the stock is all gone." Mr. Hopkins was very sick but he said: "Not that I know of; if it is gone I knew nothing about it." He also said: "I am going to give Kitty (the defendant) a wrestle for that stock she has taken and I know nothing about it."

Hopkins admits in his evidence that in the negotiation for the separation, stock was referred to, but that he meant in speaking of it the seventy-five shares held by the defendant, and German in his cross-examination of him did not ask him whether he had not told him that he had transferred the stock in dispute to the defendant.

Taking into consideration all the circumstances under which this statement was alleged to have been made to German; that immediately after it was said to have been made, Hopkins told Duncan Armstrong that if the stock was gone he knew nothing of it; and taking into consideration the evidence given by Hopkins in his examination, I am of the opinion that German was mistaken in attributing the statement of Hopkins to him to the stock in dispute.

The deed of separation would, in my opinion, have been open to successful attack by Hopkins on the ground of its having been procured by undue influence, and it cannot therefore be set up to prevent the setting aside of the transfer of the stock in question: *Bridgman v. Green* (1755), 2 Ves. Sr. 627; S.C. Wilmot's Cases and Opinions, 58, 70; *Moxon v. Payne* (1873), L.R. 8 Ch. 881; *Forshaw v. Welsby* (1860), 30 Beav. 243.

In my opinion the appeal should be dismissed with costs.

*Appeal dismissed.*

R. S. C.

## MOWAT V. PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY.

*Insurance—Life Insurance—Policy Inconsistent with Application—Repayment of Premiums—Laches.*

The plaintiff applied to the defendants for insurance at a fixed annual premium for life, but the policy sent to him contained a provision that the premium might be increased. The plaintiff did not read the policy, and, pursuant to notices from the defendants, paid them seven annual premiums at the original rate. In the eighth year the defendants demanded a larger premium :—

*Held*, that the policy, not being in accordance with the application, was a mere counter-proposal, and that there was no contract ; that the plaintiff was under no obligation to read the policy, which he was entitled to assume, in the absence of anything done by the company to call his attention to the provision in question, to be in accordance with the application ; that he was, therefore, not barred by acquiescence or delay, and that he was entitled to repayment of the premiums with interest.

Judgment of ARMOUR, C.J., affirmed, MACLENNAN, J.A., dissenting.

APPEAL by the defendants from the judgment of ARMOUR, C.J., at the trial.

Statement.

The action related to a policy of life insurance on the life of the plaintiff, issued by the defendants, bearing date the 23rd of March, 1891, for the sum of \$3,000, in respect of which the plaintiff had paid seven annual premiums of \$124.50 each, and the relief sought was that the defendants might be ordered to make good certain representations alleged to have been made to him by them, or to refund to him the premiums paid by him with interest. The judgment appealed from directed the repayment of the premiums with interest. The facts are stated at length in the judgments.

The appeal was argued before OSLER, MACLENNAN MOSS, and LISTER, JJ.A., on the 19th of January, 1900.

*Marsh*, Q.C., for the appellants. The judgment appealed from seems to proceed upon the somewhat nebulous equitable doctrine known as "making representations good." But, in the first place, there has been no failure to make good any representation, and, in the next place, even if there has been, the relief granted is not that to which the

Argument.

plaintiff is entitled. The evidence shews that there was no representation as to the premium ; there was negotiation and there was expectation, and the plaintiff took his chances as to the future rates. The policy contains a clear warning as to the possibility of an increased rate, and it is absurd to suppose that the plaintiff did not know what he was accepting. At any rate he had the means of knowledge before him, and ought to have known, and that is sufficient to dispose of his claim. He cannot, in any event, after the change in the position of the parties, and after having the benefit of the contract for so many years, rescind it and obtain back the premiums ; his sole remedy, if any, is to claim damages in an action of deceit.

*Riddell, Q.C., and R. T. Harding*, for the respondent. The whole question in this case is the simple one of fact, whether the plaintiff did or did not agree to insure at a fixed premium, and the finding in the plaintiff's favour on that question is amply supported by the evidence. The plaintiff took the objection at the earliest moment, and the delay is immaterial. The defendants themselves say that the contract which the plaintiff sets up has never existed ; it must be treated, therefore, as out of the way, and the plaintiff is entitled to repayment of the money paid by him in assumed compliance with a non-existing contract : *United States Life Ins. Co. v. Wright* (1878), 33 Ohio St. 533 ; *Hedden v. Griffin* (1884), 136 Mass. 229.

*Marsh*, in reply.

November 13th, 1900. OSLER, J.A. :—

The relief sought by the plaintiff is that the defendants may be ordered to issue to him a policy of insurance upon the terms of the application made by him to, and accepted by, them, instead of the one wrongfully issued by them upon different terms and conditions, and that the defendants may also be ordered to make good to him certain representations, on the faith of which, as it is alleged, he

was induced to apply for the policy ; or, in the alternative, that the defendants may be ordered to repay the plaintiff all the premiums he has paid on such policy, with interest. The judgment complained of awards the latter relief.

The circumstances of the case are peculiar. Upon an application, partly written and partly printed, signed by the plaintiff, the defendants granted him a policy of insurance on his life, dated the 23rd of March, 1891, for the sum of \$3,000, payable at death. The policy appears to be in all substantial respects in accordance with the terms of the application, which is set forth therein at length. It was finally delivered to the plaintiff on the 2nd of May, 1891, and he at the same time paid the defendants the first yearly premium thereon, \$124.50. About the 23rd of March in each of the following years from 1892 to 1897, inclusive, he paid the defendants a premium of the same amount in accordance with the terms of a notice sent to him by them shortly before it would fall due. In March, 1898, he received a similar notice, but the amount of the renewable premium demanded for the ensuing year was \$155.63, or \$31.13 more than that of the former premiums. The plaintiff contended that the defendants had no right under the terms of the policy to demand the higher premium. The defendants insisted that they had, and as neither party would yield the plaintiff brought this action.

His contentions are : 1st. That the policy issued is not in accordance with the application made by him in this : that the policy he applied for and the policy the defendants represented that they were issuing to him was one the annual premium payable on which for life was \$41.50 per \$1,000, whereas the policy actually issued and delivered is one in which the defendants have reserved in certain events the power to increase, as they are now attempting to do, the yearly premium. 2nd. That he accepted the policy on the faith of certain representations made to him by the defendants that at the end of five years the policy would have a large amount of cash value, large amount of

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OSLER, J.A.



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insurable value and value for extended insurance, all of which representations have proved to be untrue, and which the defendants ought to make good.

The first contention relates to the form and contents of the contract between the parties, the question, in short, being whether, having regard to the application, there ever was any contract of insurance at all. The other is as to the effect of certain representations which were evidently not intended to form part of the policy contract, but were to be embodied in a statement to be attached to it.

Broadly stated, the plaintiff's case on the first point is that he applied for one kind of policy and the defendants sent him another and different one, which he received and continued to pay premiums on, believing that it was in accordance with the terms of the application. The policy is in accordance with the terms of what purports to be the application of the plaintiff, signed by him, and, as set forth therein, is one by which the defendants agree in consideration of the stipulations, etc., in the application therefor, and upon the next page of the policy, all of which are part of the policy contract, to pay to the plaintiff's wife the sum of \$3,000 provided the plaintiff's death occurs on or before the 23rd of March, 1892.

And the defendants further agree to "renew and extend this insurance upon the like conditions during each successive year of the life of the (plaintiff) upon the payment on or before the 23rd day of March in each year, of the renewal premiums in accordance with the schedule rates, less the dividends awarded hereon." On the second page is printed: "Schedule of yearly renewable rates of premiums required to renew each \$1,000 of insurance." This sets forth the annual, semi-annual, and quarterly, premiums for ages from 16 to 60, inclusive. That for the age of 60 (which was the plaintiff's age when he made his application) is \$41.50 per \$1,000. Then follows the printed statement: "No policy is issued at an age higher than 60 years. Schedule rates on the same basis as above for renewal above that

age, subject to reduction by dividends, will be furnished on request." Conditions follow: "Regarding the death fund and the guarantee fund. After deducting the expense charge—limited to \$4 per \$1,000 insured per annum—the Society agrees to divide the residue of each renewal premium received by it upon this policy as follows: Such amount as shall be required for this policy's share of death losses will be appropriated as a death fund to be used solely in settlement of death claims; the remainder thereof will be retained as a guarantee fund. The amount so retained will be used towards offsetting any increase in the premium on this policy from year to year; or provided this policy, after five full years' premiums have been paid, be terminated solely by non-payment of any stipulated premium when due, 80 per cent. of any amounts so retained, but not so used, will be applied to extend this insurance, or, if application be made therefor while this policy is in full force and effect, to purchase paid-up insurance."

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OSLER, J.A.

"Regarding agents. No agent is, or will be, authorized to make, alter, or discharge this contract."

The application, after setting out in a schedule a number of the usual details as to the name, age, date of birth, amount required, etc., is in the following terms (so far as material):

"I hereby apply to the (defendants) for an insurance of \$3,000, payable after my death, upon the L.R. renewable term plan, with *surplus left with company to keep premiums level*, participating premiums, payable annually, in behalf of, and for the benefit of, Jane Mowat, my wife. . . . Dated at Stratford, 20th of March, 1891." The words in italics are written in a blank left in the printed form between the words "with" and "participating premiums." On the back is a printed "Note" as follows: "Please note fully the kind of policy desired as, for instance, renewable term with participating premiums (largest annual dividends), or renewable term with surplus applied towards

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OSLER, J.A.

keeping premiums level (L.R.), or ten or twenty years renewable term, etc.”

The terms of this application afford little information as to what is meant by the “surplus” which is to be left with the company “to keep the premium level,” but I think it would be difficult for the plaintiff to contend successfully that the policy he received and retained for so many years is not such a policy as the defendants might have issued thereon, with a yearly increasing renewal rate of premium kept down to, or level with, the first year’s premium by the surplus profits gained in the company’s business appropriated to the policy, and left with them for that purpose.

His case, however, is that the application set forth in the policy does not truly represent that which he in fact made to the company. On this point the evidence, stated as concisely as possible, is as follows: The plaintiff says that one Slaght, a local agent of the defendants, canvassed him for a policy; that he explained the various systems of insurance; that plaintiff told him he would only have “all life,” no endowment; that the rate was spoken of, and Slaght said that at plaintiff’s age, 60, it would be on the level premium, \$41.50 per \$1,000, payable yearly, “for all life.” They spoke of a system of insurance by which the rates were raised every two or three years as the case might be. Plaintiff told Slaght that he would have nothing to do with level premium rate (by which he seems to have meant a premium kept level by the application of profits). And further, that he must have a statement shewing the cash value of his policy at the end of five, ten, and fifteen years, and so forth, and the amount of paid-up insurance that the money would be good for, and also the amount the extended insurance would be good for. He casually, he says, glanced over the application (by which, I suppose, he means the printed form), but did not sign it because it did not provide for these things, and Slaght said it did not meet his views in these respects. He read it partially—

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the amount more than anything else—the name, and so forth. It was filled up by Slaght. Plaintiff said it did not set forth what he wanted, and Slaght replied, “Well, then, write out what you want yourself and attach it to the application, and I will forward it to the company.” The plaintiff wrote out a memorandum, which he attached to the application as part of it, signed the application, which bears date the 20th of March, 1891, but which was probably not actually signed until about the 19th of April, and left it with Slaght to be forwarded. He says he noticed the letters “L.R.” in the application, which Slaght explained to him as meaning “level rate,” but did not notice the other part about the surplus. He was examined as to the contents of the memorandum, which was not produced, and was said to be lost. He says it was addressed to the company, and set forth something in the following language, as nearly as he could recollect: “The agent of your company, Mr. Slaght, has called upon me with the view of inducing me to effect insurance in your company, and he states that at my age, 60, the premium per thousand dollars would be \$41.50 per year for life; that at the end of five years, Mr. Slaght states, that there will be a large amount of cash value, large amount of insurable value and extended insurance, without naming any definite amount, and that if I continued my policy the amounts would increase. If these statements are correct, then I will take a policy for \$2,000, and I will insist upon getting a statement in writing, to be attached to the policy, setting forth the value of the policy at the end of five years, ten years, and so forth.” The application, with the attached memorandum, was sent forward to the defendants’ general manager for Canada at Toronto, about the 19th of April, and on the 20th, the latter wrote to the plaintiff asking for an explanation of the discrepancy between the amount of insurance mentioned in the application and that mentioned in the memorandum attached to the same “apparently in your handwriting.”



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The letter was answered by the plaintiff on the 22nd explaining that he had at first intended to take out a \$2,000 policy but the local agent had persuaded him to make it \$3,000, and the policy was accordingly to be issued for the latter amount. These letters relate in other respects to the statement in writing which the plaintiff required to be attached to the policy as to paid-up value, extended value, and so forth, which, on this branch of the case, I do not further refer to, except to say that other letters on that subject, dated the 29th of April and the 2nd of May, 1891, were written by the general manager to the local manager intended to be communicated, and which were communicated, to the plaintiff.

In the meantime the plaintiff's application was sent forward by the general agent to the head office in New York, and on the 29th of April, 1891, the former, having received the policy duly executed by the defendants, sent it to the local agent to be delivered to the plaintiff. The plaintiff was not satisfied with the statements as to the future value, etc., contained in that letter, and wanted something more definite, but upon getting the letter of the 2nd of May thought that the two together to a great extent met his requirements, and thereupon paid the premium and received the policy, to which he attached the letters in question. He was asked by his counsel: "Then you did not get any assurance apparently in writing about the \$41.50 for the whole life? No. You wrote that in your memorandum but did not get any statement from the company? No. You took it for granted, getting the policy, that it was all right? Certainly. And when did you get your policy? Just shortly after giving the cheque. Did you read it over? Well, I just glanced to see that the amount was correct and how it was payable."

Then he says he always paid a premium of the same amount as the first, in accordance with the defendants' yearly notice, until March, 1898. "When was the first you heard about a yearly renewable plan? After asking

for an explanation of the increase in the amount of the premium. Had that ever been suggested to you before? No, never. You say you told Mr. Slaght that you would not accept anything except on the level system—had been caught before? Quite so. Would you have accepted this if you had known of that fact? Certainly not.”

On cross-examination he said that Slaght shewed him the policy within a day or two after the 29th of April. That he was not satisfied with it. “What was the cause of your dissatisfaction? In the first place, there was no statement attached to it that I expected would be furnished. He (Slaght) came to the office with the policy? Yes. And you examined it there when he brought it to you? I probably looked at it. How many times did you examine it? Only on the first occasion, when I handed it back to him. When, then, did you see it again? On the day that I paid for it. There was no difficulty about seeing it? No. You had all the inspection of it you wanted? Yes.”

Re-examined: “What do you mean by saying ‘examined’ the policy, because it is a word that has hundreds of meanings? Just looked at it casually to see that it was for the amount of \$3,000, and payable to my wife in case of my decease. Did you give it any further examination than that? No.”

Slaght, the local agent, was dead at the time of the trial. Matson, who had apparently ceased to be the general manager, was examined, whether as a witness or for discovery does not appear from the appeal book. He verified the application, and said that there was a memorandum attached to it, and he does not deny that it was sent on to New York with the application.

The learned trial Judge found that the plaintiff did write the memorandum in question in the terms sworn to by him, that it was attached by him to the application, and sent forward to the general manager of the defendants at Toronto, and that the application was sent by him to the

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defendants' head office at New York. If these conclusions are accepted, the inference drawn by the learned Judge that the memorandum attached to it also reached the head office is, in the absence of any evidence to the contrary, probable and reasonable. I do not think it necessary to say whether I should have accepted the plaintiff's evidence as to the contents of the memorandum. It does not read very well as it appears upon the notes, and was prompted in a way that it ought not to have been, but the trial Judge appears to have believed it, and I do not see my way to hold that he was wrong in doing so. The case, therefore, on this branch, does not turn upon the question of Slaght's authority to represent that the premium would be at the level rate of \$41.50 per \$1,000 for every year throughout the plaintiff's life, or whether he did, in fact, make such representation. It must now be taken that the plaintiff informed the defendants that Slaght had so told him, and that he applied for a policy on those terms. Clearly, then, the policy sent him was not such a policy as he had applied for, and the defendants did not inform him that they would not insure on those terms, otherwise than by the delivery of a policy on quite different terms, in other words, by making him a counter-proposal. The question, therefore, is whether he ought, upon the evidence, to be taken to have accepted the counter-proposal by reason of having paid the premium and retained the policy? He had no actual notice of the contents of the policy, and unless the defendants brought to his notice that it was delivered to him as a counter-proposal, there could, it seems, be no imputed knowledge of the contents, inasmuch as there was no obligation binding him to read it: *Liverpool and London and Globe Ins. Co. v. Wyld* (1877), 1 S.C.R. 604, at p. 650. Delivered to him as it was without any statement that the annual premium would not, or might not, be the same throughout the plaintiff's life, he might well assume that it was a policy in accordance with the special

terms which he had stipulated for in that respect. It will hardly be denied that if the plaintiff had immediately, or within a year after payment of the first premium, discovered what the terms of the policy really were, he might have repudiated it, and have brought an action to recover back the premium he had paid. I do not see that the subsequent lapse of time places him in a different position, except so far as it suggests the probability that he might have examined the policy and discovered the error. The evidence rebuts the force of this suggestion, and it must be said that the yearly notices as to the accruing premium, and the receipts given to the plaintiff therefor from time to time, were well calculated to throw him off his guard and to satisfy him that the only premium was a yearly one, of fixed and not of increasing amount, and not subject to fluctuations, or kept down to the sum demanded by the deduction of the yearly accruing profits.

On the whole it appears to me that the judgment should be affirmed on this ground, and the appeal dismissed. It is, therefore, unnecessary to express any opinion as to the other grounds on which the judgment was rested.

*Richardson v. Rowntree*, [1894] A.C. 217; *Robertson v. Grand Trunk R.W. Co.* (1895), 24 S.C.R. 611; Pollock on Contracts, 6th ed., pp. 46, 47, may be referred to.

Moss, J.A.:—

If we were obliged to treat this case as one of representation merely, I should be inclined to the opinion that nothing more was done by Slaght, the defendant's local agent at Stratford, in the way of representation as to the amount of the annual premium, than to express the belief that, having regard to the previous experience of the company, the surplus of dividends in the future would be sufficient to keep the rate level at \$41.50 per \$1,000, or \$124.50 per annum on a \$3,000 policy.

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And there is much in the case that would have led me, if I had been trying it in the first instance, to the conclusion that the memorandum written out by the plaintiff and transmitted by Slaght to Matson, the general manager at Toronto, with the printed application, contained no reference to the amount of the annual premium. But undoubtedly the defendants received the memorandum along with the printed application, and the responsibility for its non-production rests with them, and in its absence they have tendered no evidence to countervail the version of its contents given by the plaintiff. The learned Chief Justice gave credit to the plaintiff's testimony, and has found the contents of the memorandum to be as testified to by him. And with that finding it is not possible, upon the evidence in the record, to interfere.

The two important questions to be determined, as the case comes before us, appear to me to be : (1) whether the plaintiff received from the defendants the policy he bargained for with Slaght and for which he applied to the defendants; (2) whether, if he did not, he accepted the policy he did receive as an alternative policy offered by the defendants, and agreed to its terms, or should be deemed to have done so by reason of his acts or omissions, or the lapse of time, or both.

The memorandum or slip read in connection with the plaintiff's evidence must be taken to have been intended to form part of the application. And, as regards the amount of the premium to be paid, it was distinctly an offer to take a policy for \$2,000 (afterwards increased to \$3,000) if at his age the premium for \$1,000 would be \$41.50 per year for life. With respect to the statements as to the amount of cash values, etc., the plaintiff desired a statement in writing to be attached to the policy setting forth the value at the end of five years, ten years, etc.

In response to this application the defendants sent the policy in question, and afterwards there were written the two letters of the 29th of April and 2nd of May, 1891,

which came to the plaintiff's possession, and were by him accepted as fulfilling the last part of the slip and attached to the policy.

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The pleading puts the case almost entirely as one of representation, but in his evidence the plaintiff treats it as one of contract, *i.e.*, that he was to have a policy on his life for \$3,000 at an annual premium during his lifetime of \$124.50 and no more. He does not put it in his testimony that he depended upon a representation that the premium would only be that much per annum. He was not willing to rely upon a representation that such would prove to be the case, but insisted that his application should contain a stipulation to that effect. According to his evidence he intended to make a contract with the defendants that his premium should be \$124.50 and no more. He says he was not content to rely upon Slaght's representation that the premium would only be \$41.50 per annum for each \$1,000, and accordingly when the printed form of application was being filled in he told Slaght that it did not contain what he wanted. Slaght told him to write out himself what he wanted and attach it to the application. He accordingly wrote out the slip and attached it to the application, which was transmitted by Slaght to Matson.

It is plain that so far as the amount payable annually as the premium is concerned, the policy received by the plaintiff is not that stipulated for in the slip. For while it states the sum of \$124.50 as the amount of the premium for the first year, an attentive perusal of the remainder of the policy shews that the renewal premiums are to be paid each year in accordance with the schedule rates, less the dividends awarded. Turning to the schedule of rates, which are printed on the back of the policy, we find set out the amounts of the yearly renewable rates up to the age of 60 years, with a note appended stating that no policy is issued at an age higher than 60 years, and that "schedule rates on the same basis as above *for renewal above that age, subject*

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*to reduction by dividends*, will be furnished on request." This is, of course, an entirely different matter from a uniform rate of \$124.50 per annum for the life of the plaintiff, and was not in accordance with the terms of the entire application.

The plaintiff did not, therefore, receive from the defendants the policy which he bargained for with Slaght, and for which he made application to the defendants. Did he accept it and agree to its terms as an alternative policy offered by the defendants? He did not do so expressly or in terms. He says that after it was sent to him he looked through it and saw that he wanted further particulars about the surrender value or paid-up policy, and he discussed it with Slaght before finally accepting the policy, and then he was furnished with the letters which he attached to the policy. He adds in re-examination that he just looked at the policy casually to see that it was for the amount of \$3,000 and was payable to his wife, and gave it no further examination than that. But, so far as appears, the question of the premium was not discussed between him and Slaght at any time after the policy was sent to Stratford.

He retained the policy in his possession for seven years, during which time he paid an annual premium of \$124.50. In March, 1898, he was notified for the first time that he was required to pay \$155.63 as the premium for the next renewal, and thereupon he at once wrote objecting, and alleging that he never understood that the defendants reserved the power of increasing the premium, and that the policy did not read in such a way as to indicate that the premium was liable to be increased. Further correspondence ensued, and on the 21st of April, 1898, the plaintiff tendered \$124.50 in payment of the premium for the year. This was refused and the demand for \$155.63 repeated. The correspondence was continued through the months of May and June, and finally the writ in this action was issued on the 5th of July, 1898.

Should the plaintiff be held to have accepted the policy under the circumstances?

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The case has not all the elements to be found in *Henderson v. Stevenson* (1875), L.R. 2 Sc. App. 470; *Bate v. Canadian Pacific R. W. Co.* (1889), 18 S.C.R. 697, and *Richardson v. Rowntree*, [1894] A.C. 217, in which it was distinctly shewn that the conditions sought to be imposed were separate and distinct from the apparent contract between the parties, and could only be seen by reference to another part of the instrument in which the apparent contract was set forth, and it was clear that the parties taking it had not an opportunity, or a sufficient opportunity, of examining the whole instrument. Here the plaintiff had ample opportunity of reading and examining his policy and becoming aware of its whole contents, and if he was bound to do so the action should fail by reason of his failure to perform his duty.

But the difficulty in the defendants' way arises from the fact that the plaintiff has shewn that the application taken as a whole was for a policy at a uniform rate of premium for his life, and that that was what he intended and expected to contract for. The defendants did not give him that, or intend to do so. The policy sent must, therefore, be regarded as a counter proposition, and not as a policy issued in compliance with the application. That being so, can the defendants rightly maintain that because they sent a policy containing, as they allege, the contract they intended to enter into, and because the plaintiff retained the policy for a long time, he must be deemed to have accepted and assented to it, and is now estopped from contending that it is not the contract he intended to enter into? Or was it not the defendants' duty, seeing that there was a variation between the application and the policy, to have taken measures reasonably sufficient to give the plaintiff notice of the change?

And was he not, without being open to the charge of negligence or laches, excusable in relying with reasonable



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confidence that the policy was transmitted, not as a new offer on the part of the defendants, but as the policy he had applied for and agreed to take?

In many American decisions it is emphatically asserted that it is the duty of an applicant for assurance to read and know the contents of the policy when he receives it. But even this rule may be varied by circumstances. In England there are authorities holding in respect of other classes of contracts that there is an obligation on the part of the contractee to make himself aware of all the terms and conditions of the contract. Many of these are discussed in *Watkins v. Rymill* (1883), 10 Q.B.D. 178, where the rule was applied. But it is also well established by many cases that the rule yields readily to circumstances. In some instances the first duty is upon the contractor to shew that he has taken measures reasonably sufficient to give the contractee notice that he is required to read and inform himself of the terms of the proffered contract.

In this case if the policy sent to the plaintiff had been the only or even the first instrument or writing passing between the parties, I should have thought that the defendants' contention that the plaintiff was not justified in placing it away without taking pains to make himself aware of its contents was highly reasonable. But it was not the first document or writing. It was preceded by the application which called for a policy according to certain terms as to payment of premiums. And upon the evidence the application was in accordance with the terms already arranged or understood between Slaughter and the plaintiff. When the latter received the policy, without its being pointed out in writing, or otherwise, by the defendants that it was not in accordance with the terms of the application, was he not entitled reasonably to conclude that it was issued to correspond with his application?

In the much litigated case of *Wyld v. Liverpool and London and Globe Ins. Co.*, the facts of which are to be found reported (1873) 33 U.C.R. 284, (1874) 21

Gr. 458, (1876) 23 Gr. 442, and (1877) 1 S.C.R. 604, there was a bill filed to rectify a policy of insurance against fire issued by the defendant company upon a stock of merchandize, the property of the plaintiffs, so as to make the risk cover certain goods and merchandize in a part of a building adjoining the plaintiffs' warehouse.

It was held by the Courts that an interim receipt given to the plaintiffs by the agent of the defendant company did include and cover the goods and merchandize in question, but the policy purporting to be issued in pursuance of the interim receipt did not. The policy had been received by the plaintiffs some months before the fire, and was deposited by a clerk in the safe without having been read by the plaintiffs. A principal question was whether the plaintiffs were to be deemed to have accepted the policy and assented to its terms so as to make it supersede the contract contained in the interim receipt. The point was determined against the defendant company. There was a division of opinion in the Supreme Court, Richards, C.J., Strong, and Taschereau, JJ., being in favour of the plaintiffs on all points. Henry, J., was adverse to them on all points. Ritchie, and Fournier, JJ., were also opposed to the plaintiffs, but, as I understand their judgments, only on the ground that the interim receipt did not cover the goods and merchandize in question, and that, therefore, there was no contract in regard to them. On the question of the effect of the receipt and retention of the policy, Ritchie, J., is reported as having expressed himself to the effect that assuming there was a valid contract to insure, and that the policy was drawn up in a form different from the agreement, altering the substance of the agreement and varying the right of the parties assured, he thought the case should be dealt with on the footing of the agreement and not of the policy. "The plaintiffs ("defendants" is printed but it is plainly an error) not having been notified . . . might fairly assume, without examination, that the policy delivered was the policy referred to in

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the receipt, and not a new or other policy covering a risk which they had not offered the company; and if the company inadvertently or intentionally sent a policy not contemplated by the receipt, the plaintiffs would not be bound by it." And again that "he could not think that the holding of the policy under the circumstances of this case could be considered such an acquiescence in a new agreement; that the mere transmission of the policy and retention by the plaintiffs would not, as a matter of law, constitute an acceptance on the plaintiff's part." The present Chief Justice of Canada said (p. 649): "Then the facts being that the appellants delivered a policy, but not one according with the terms or in consummation of the contract entered into with the agent; that this policy, thus containing what, in law, would be no more than a proposal from the company for an assurance which the plaintiffs never contemplated, came into the possession of the respondents' clerk, and was by him deposited in the respondents' safe, where it remained without ever having been read by either of the respondents until after the fire, it is out of the question to say that there was ever such an assent on the part of the respondents to the terms of the insurance embodied in the policy as to constitute an original contract independently of the receipt, and in that way to rescind or supersede the contract evidenced by the receipt." Further on he said (p. 650): "There could be no imputed knowledge of the contents of the policy, inasmuch as there was no obligation binding the respondents to read it; indeed, on the other hand, the respondents might well assume that it was sent to them to carry out the only contract of insurance they had with the appellants, that entered into through their agent Hooper, and not, as according to the contention of the insurance company it must have been, as a proposal for a contract entirely different in its terms from that just mentioned."

While these observations may be said to have been made with reference to the circumstances of the case under

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consideration, they appear to me to bear in principle upon the facts of this case, as well as to emphasize the principle that, in considering whether or not there has been an acceptance of the terms of a policy, the particular circumstances of each case must be taken into account.

In the present case the defendants took no steps to notify the plaintiff, or draw his attention to the fact that the policy sent was, as regarded the premium, not expressed to be in the terms called for by the application. There was nothing *dehors* the policy to draw his attention to the fact that the defendants were not assenting to his application, and instead were sending him a new proposal, and under the circumstances it was not unreasonable for him to suppose that it was a policy answering the terms of the application.

It imposes no hardship upon an insurance company to require of it, that if, in answer to a written application, it sends a policy not intended to be in terms of the application, it shall notify the applicant of the particulars wherein they differ.

In 1876 the Board of Commissioners appointed under the Act 38 Vict. ch. 65 (O.), for the purpose of determining what conditions were just and reasonable to be inserted in a fire insurance policy, recommended the adoption, amongst others, of the following condition: "After application for insurance it shall be deemed that any policy sent to the assured is intended to be in accordance with the terms of the application, unless the company shall, in writing, point out the particulars wherein the policy differs from the application." The Legislature adopted this condition as reasonable to be contained in a policy against fire and it is to be found in the Act, 39 Vict. ch. 24 (O.), as No. 2 of the Statutory Conditions, and is now in sec. 168 of R.S.O. ch. 203. The Board of Commissioners were only authorized to deal with contracts of fire insurance, but there appears no reason for supposing that what was deemed reasonable by the Legislature in regard to fire



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insurance policies would not be equally reasonable in regard to policies on lives if the question had to be considered. I only refer to this legislation as meeting any suggestion of hardship or unreasonableness in imposing such an obligation upon the defendants.

I think the plaintiff was, under the circumstances, excused from any charge of negligence or laches in not reading the policy, for he might reasonably assume that it was according to the application. That being so he cannot be charged with any subsequent negligence or laches.

He was encouraged in his belief during the years that followed by the receipt of demands for \$124.50 only, and there was nothing to give occasion for reference to the policy. And immediately upon the increased demand being made he took the position which he has ever since maintained.

In this view of the case he was not bound by the terms of the policy as to the amount of the premium, and as the defendants have refused to be bound to the terms of the application and insist they did not accept or agree to them, the judgment appealed from gave the appropriate form of relief to the plaintiff by adjudging a return of the premiums.

The plaintiff asked to be allowed to amend the statement of claim if necessary. There is no good reason why all proper amendments should not be made, but they should be submitted to the defendants and the Court before the certificate issues.

LISTER, J.A. :—

I am of the same opinion.

MACLENNAN, J.A. :—

The learned Chief Justice finds that the plaintiff was induced to enter into the contract of insurance by the representation of one Slaght, an agent of the defendants, that the yearly premium payable by him during his life

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for the insurance would be \$41.50 for each \$1,000 insured, and that the amount of such premium would not vary; and that the defendants are bound by that representation. He also finds that the defendants are bound by a representation made by one Matson, the general manager for Canada of the defendants, as to the surrender value of the policy. This last representation was contained in a letter of the 2nd of May, 1891, written by Matson to Slaght, intended to be, and in fact, communicated to the plaintiff, in which Matson says: "I fancy Mr. Mowat will not require to call for a paid-up policy, or the cash surrender value; however, in order to satisfy him, I beg to say that the cash surrender value of his policy at the end of five years should be about \$275, paid-up policy should be about \$500, or extended insurance about four years. This is as near as I can judge without going into lengthy calculations. If Mr. Mowat needs anything further from us direct, I shall be pleased to communicate with him." In March, 1898, the defendants refused to renew the policy for another year without an increased premium of \$155.63, and refused a tender of the former rate of \$124.50. They also refused to issue a paid-up policy, or to pay anything for a surrender of the existing one. Thereupon the plaintiff brought his action on the 5th of July, 1898.

The application for the policy was signed on the 20th of March, and the policy is dated on the 23rd of the same month, but it was not delivered to, or accepted by the plaintiff, until some time after the 2nd of May. In the meantime there had been discussion and correspondence on the subject between the plaintiff and the agents, culminating in the letter of the 2nd of May, written by the agent Matson, already referred to. The application was sent forward by Slaght to Matson in a letter dated the 18th of April, and along with it was enclosed a slip written by the plaintiff, asking, as the writer says, for a statement to be attached to his policy, shewing the surrender values at the end of the fifth and subsequent years. This

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slip has not been produced, but the plaintiff in his evidence states the substance to have been, as near as he can remember, as follows: "The agent of your company, Mr. Slaght, has called upon me with the view of inducing me to effect insurance in your company, and he states that at my age, 60, the premium per thousand dollars would be \$41.50 per year, that at the end of five years, Mr. Slaght states, that there will be a large increase in cash value, a large increase of extended insurance value, and a large amount of paid-up insurance." He adds that perhaps he made a mistake in using the word "increase." "A large amount of cash value, large amount of insurable value and extended insurance, without naming any definite amount, and that if I continued my policy the amounts would increase." He adds: "And I said that if so, if these statements are correct, then I will take a policy for \$2000, and I will insist upon getting a statement in writing, to be attached to the policy, setting forth the value of the policy at the end of five years, ten years, and so forth." He says further that in the slip it was stated that the length of time the \$41.50 was to be paid was for life. This slip or memorandum was sent with the application to Matson, and was probably sent by him to the head office of the company in New York. The only response to it, however, came from Matson, in a letter of the 20th of April, in which he states the great difficulty of estimating the cash value at the end of five years, and the paid-up value, etc., and adds: "We will issue the policy in the meantime, send it to our Mr. Slaght, and I think you will find the conditions to your satisfaction." The plaintiff answered this letter on the 22nd of April, in which he says: "My intention is to take the \$3,000 policy" (instead of \$2,000 as had been talked of), "and you can, therefore, fill out one for that amount. As for my wanting to know the cash value, and paid-up value of the policy at say five years, if you give an approximate that will do." The policy was accordingly prepared and sent to Slaght by

Matson on the 29th of April, saying he would rather not make estimates of surrender value, etc., but would try and frame something to suit the plaintiff. The letter of the 2nd of May followed, and the plaintiff says these letters "to some extent, to a great extent" met his requirements; and he paid the premium. He says he attached the letters of the 29th of April and 2nd of May to the policy, and filed them away.

There is no reference in the letters to the premium as being a fixed rate for life or otherwise. The plaintiff says he got nothing in writing on that subject, but took it for granted, that in that respect the policy was right.

The application, which was signed by the plaintiff, and a copy of which is endorsed upon the policy, so far as is material, is as follows: "I hereby apply to the Provident Savings Life Assurance Society of New York for an insurance of \$3,000, payable after my death, upon the L.R. renewable term plan, with surplus left with company to keep premiums level, participating premiums, payable annually, in behalf of, and for the benefit of, Jane Mowat, my wife." And the application has endorsed upon it the following note: "Please note fully the kind of policy desired, as for instance, renewable term with participating premiums (largest annual dividends), or renewable term with surplus applied towards keeping premiums level (L.R.), or ten or twenty years renewable term, etc."

By the policy the company, in consideration of the stipulations and agreements in the application herefor and upon the next page of this policy, all of which are part of this contract, and in consideration of \$124.50, being the premium for the first year, promise to pay Jane Mowat \$3,000 within 60 days after acceptance of satisfactory proofs of the death of W. Mowat, provided such death shall occur on or before the 23rd of March, 1892. And the said society further agrees to renew and extend this insurance upon the like conditions, without medical re-examination, during each successive year of the life of

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the insured from date hereof, upon the payment on or before the 23rd day of March in each year, of the renewal premiums in accordance with the scheduled rates, less the dividends awarded hereon. The second page of the policy contains, among other things, a schedule of yearly renewable rates of premium required to renew each \$1,000 of insurance. This schedule gives the rate for renewal for all ages from 16 to 60, but not beyond, the rate for the age of 60 being that paid by the plaintiff. It is stated, however, that no policy is issued at an age higher than 60 years, and that schedule rates on the same basis as above for renewal above that age, subject to reduction by dividends, will be furnished on request. The second page of the policy also contains a stipulation for applying the premium income of the company, after deductions for expenses and death claims, towards offsetting any increase of premium on the policy from year to year, or under certain circumstances, after five years, towards extending the insurance, or, if applied for, to purchase paid-up insurance.

There is also a stipulation that no agent "is, or will be, authorized to make, alter, or discharge this contract, or to waive any forfeiture thereof, or to extend this insurance, or to grant permits, or to receive for premiums anything but cash."

It cannot be disputed that this policy is exactly the kind of policy which is asked for in this application, namely, a policy on the L.R. (level rate) renewable term plan, with surplus left with company to keep premiums level; participating premiums, payable annually. It is a policy for a term of one year; the rate is intended to be kept level by means of the surplus left with the company for that purpose; the premium is to be paid annually, and the assured has a right of participation, for certain purposes and in certain circumstances, in a portion of the premium income of the company. No one can read the application and the policy, with any degree of attention, without seeing

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that it is not a policy at a fixed annual premium for life, but one renewable year by year at an increased rate, unless kept level out of the company's surplus. The plaintiff suggests, rather than asserts, that he did not examine the policy, but took it to be one at a fixed rate of premium for life; but, if so, I think he cannot complain. The case of a formal instrument, like the present, prepared and executed after long negotiation and correspondence, delivered and accepted and acted upon for years, is wholly different from the cases relating to railway and steamship and cloak-room tickets, in which it has been held that conditions qualifying the principal contract of carriage or bailment, not sufficiently brought to the attention of the passenger or bailor, are not binding upon him. Such contracts are usually made in moments of more or less haste and confusion, and stand by themselves. In *Parker v. South Eastern R. W. Co.* (1877), 2 C.P.D. 416, and in *Richardson v. Rowntree*, 1894] A.C. 217, it was held that in such cases the carrier must do what is reasonably sufficient to give the passenger notice of the conditions. In *Henderson v. Stevenson* (1875), L.R. 2 Sc. App. 470, a steam packet company gave the plaintiff a ticket having nothing on its face but the words "Dublin and Whitehaven" for which he paid the fare, and went on board the steamer. There was, on the back of the ticket, an intimation that the company were not liable for losses of any kind, or from any cause. The ship was wrecked, and the passenger's luggage was lost. It was held that the plaintiff, not having observed what was on the back of the ticket, was not bound by it. Cairns, L.C., said (p. 475): "It seems to me that it would be extremely dangerous, not merely with regard to contracts of this description, but with regard to all contracts, if it were to be held that a document complete upon the face of it can be exhibited as between two contracting parties, and, without any knowledge of anything beside, from the mere circumstance that upon the back of that document there is something

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else printed, which has not actually been brought to, and has not come to the notice of one of the contracting parties, that contracting party is to be held to have assented to that which he has not seen, of which he knows nothing, and which is not in any way ostensibly connected with that which is printed or written upon the face of the contract presented to him." There is nothing like that in the present case. The policy in question is a simple instrument, plain and distinct in its terms, accepted by the plaintiff, and acted upon by him without complaint or objection for seven years. It is not like the case of *Wyld v. Liverpool and London and Globe Ins. Co.* (1877), 1 S.C.R. 604, for in that case there was an actual contract of insurance independently of the policy, by virtue of an interim receipt, which the Supreme Court held had never been put an end to. Here there is no pretence that the defendants or their agents ever agreed to a policy at a fixed premium for life, or otherwise than as expressed in the application which the plaintiff signed. It is true he says he sent a slip with his application desiring a policy at \$41.50 annually for life; but he had also actually signed a formal application asking that it should be "upon the level rate renewable term plan, with surplus left with company to keep premiums level." In this connection it is curious to note, that in his evidence he says he told the agent he "would have nothing to do with level premium rate," and yet on page 6 of his statement of claim he says he made application for insurance on the "level rate plan," and paid the premium therefor. Nor does he in his statement of claim, rest his case in any way on the fact that the policy is not in accordance with his application, in not providing for a fixed premium for life, but providing instead for a premium upon the level rate renewable term plan.

The case then is simply this: The plaintiff signs an application, and with it another paper requiring certain assurances, and that he desired the premium to be a fixed

rate for life. The application and the additional paper are sent forward to the general agent and the company; a correspondence ensues, and he says the letters he received "to a great extent met my requirements, and I gave a cheque for the amount." There was not a word in the correspondence about the rate of premium, and the company prepared and sent him a policy, not according to the slip, but in accordance with the signed application. He accepted it, paid the premium, and continued to do so without question for seven years. I think it is impossible, after the lapse of so many years, during which the plaintiff has actually been insured, and the company under risk, and also after the death of the agent Slaght, to qualify the clear and express terms of the policy, or to rescind it, on the plaintiff's own merely oral testimony, that it is not the contract which he intended to make, or thought he was making. I am, therefore, of opinion that the first ground on which the judgment is rested wholly fails.

Then as to the other ground of the judgment, namely, the alleged misrepresentation of the value of the policy at the end of five years, etc. The plaintiff was a business man, a banker, who had knowledge and experience in life insurance, and who at the time had life insurance in four other companies. He was applied to by Slaght to insure in the defendants' company; and the agent no doubt commended his company to the best of his ability. The plaintiff was cautious, and told him he must have a statement shewing the cash value of the policy at the end of five, ten, and fifteen years, etc., and the amount of paid-up insurance the money would be good for, and also the amount the extended insurance would be good for. The agent answered there would be a large amount of cash value, a large amount of insurable value and extended insurance. The plaintiff's caution resulted in his obtaining from Matson, along with the policy, the two letters which have been mentioned, which "satisfied his requirements." These letters shew that the estimates of value

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therein contained were mere estimates, were only approximate, estimates being difficult to make. The plaintiff must have known very well that these estimates could only be forecasts of the future, founded on the experience of the past, which might be verified, or altogether disappointed. The provisions of the policy stated clearly the source from which the improved value, if any, was to be derived, and that they depended mainly upon the volume of future death claims. Under the circumstances Matson could do no more than he did. He says the surrender value at the end of five years *should be about* \$275, and the paid-up policy *should be about* \$500, and he adds: "That is as near as I can judge without going into lengthy calculations." It is not shewn that this estimate was made dishonestly or fraudulently. It is no more than the representation of the judgment and opinion of the agent, of the future prosperity and success of the company; and not a representation of an existing fact, or existing facts, entitling the plaintiff to rescind the contract and to recover back his premiums: *Jorden v. Money* (1854), 5 H.L.C. 185; *Citizens Bank v. First National Bank* (1873), L.R. 6 H.L. 352; *Maddison v. Alderson* (1883), 8 App. Cas. 467. I, therefore, think that this ground of the judgment also fails, and that the appeal should be allowed, and the action dismissed.

*Appeal dismissed, MACLENNAN, J.A., dissenting.*

R. S. C.

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## BAILEY V. KING.

*Husband and Wife—Criminal Conversation—Damages—Statute of Limitations.*

Criminal conversation is a continuing wrong, and where the wife is enticed away more than six years before, but the criminal conversation continues down to the time of the bringing of the action, the husband may recover such damages as he has sustained within the period of six years next before the bringing of the action; recovery in respect of the enticing away and of anything else which happened prior to the six years being barred by the Statute of Limitations.

Judgment of MEREDITH, C.J., affirmed, ARMOUR, C.J.O., dissenting.

APPEAL by the defendant from the judgment at the trial.

Statement.

The following statement of the facts is taken from the judgment of ARMOUR, C.J.O.

The plaintiff was married to his wife in England on the 8th of August, 1861, and they lived together there as husband and wife until the 24th of March, 1886, and had nine children, only one of whom was surviving at that time.

In August, 1885, the plaintiff commenced to carry on a drapery business at Doncaster, his wife managing it, and he having a position at Leeds, about thirty miles distant, whither he went on Monday mornings, returning home on Saturday nights.

The defendant was in the employment of the plaintiff as a clerk in the drapery business, and on the 24th of March, 1886, he and the plaintiff's wife (she being then forty-five years of age and he being then twenty-two or twenty-three years of age), eloped, taking with them goods of the plaintiff, and going to Liverpool, thence to Halifax, and thence to Toronto, arriving there in April, 1886, coming out in the ship as man and wife, travelling as man and wife, and continuing to live as man and wife ever since.

In 1897 the plaintiff came to this Province, and on the 1st of September, 1897, commenced this action, and in his statement of claim alleged:—(6). That at the repeated

Statement.

requests of the defendant the plaintiff's wife left the plaintiff at Doncaster and went to the City of Toronto, in the County of York, in company with said defendant. (7). That the said defendant and the said Elizabeth Mary Bailey resided together as man and wife in the said City of Toronto from the year 1886 to the present time. (8). That by reason of the actions of the said defendant the plaintiff had been deprived of the comfort and enjoyment of the society of his wife, and her affections had been alienated from the plaintiff, and he had been deprived of the assistance which he formerly derived from her and which he was entitled to. (9). That the defendant wrongfully and without the consent of the plaintiff took away from the plaintiff his said wife and procured her to absent herself from some time in the year 1886 to the time of the commencement of this action. (10). That the defendant was always aware that the said Elizabeth Mary Bailey was the wife of the plaintiff. (11). That by reason of the said absence of his said wife the plaintiff lost the society and service of his said wife. (12). That said defendant at the time of leaving Doncaster as aforesaid carried away with him a quantity of personal property the property of the said plaintiff, which he had in his possession and refused to deliver to the plaintiff.

To these allegations the defendant pleaded:—(1). That the causes of action which the plaintiff's statement of claim purported to set forth did not accrue within six years before the writ of summons herein was issued, and the said causes of action were barred by the Statute of Limitations, 21 Jac. I. ch. 16, sec. 3; and (2) that the cause of action which paragraphs 8, 9, and 11 of the plaintiff's statement of claim purported to set forth was abolished by "An Act to amend the law relating to Divorce and Matrimonial Causes in England," 20 & 21 Vict. ch. 85, sec. 59.

At the trial, before MEREDITH, C.J., the facts above stated were proved, and at the close of the evidence the following took place:—"Mr. Lobb, for defendant: There

Statement.

are three causes of action set forth, one is the criminal conversation, one is the enticing away, and the other is the conversion of the goods. His Lordship: The jury may, if they think proper upon this evidence, I suppose, come to the conclusion, looking at it in the light of the earlier proceeding how she was living with him, whether there was an enticing originally and whether she was kept by the same means. However, I do not suppose that is of very much importance. The gravamen of the charge is the adultery, I suppose. If the jury, upon this evidence, come to the conclusion that this defendant was keeping the woman from her husband during the six years, as well as cohabiting with her, they are at liberty to do that and assess damages. Mr. Lobb: Of course I submit there is no evidence of enticing away to go to the jury. His Lordship: Yes, but I will let the whole case go to the jury."

The learned Chief Justice gave no direction to the jury as to the cause of action for enticing away, and at the close of the charge the following took place:—"Mr. Lobb: It would have been advisable to have asked the jury if they found for criminal conversation what the damages were, and then, if for enticing away what the damages were. His Lordship: No, I will not do that. I left it better for you than I should have done. I am not giving them an opportunity for giving damages for enticing away. I have excluded that. Mr. Lobb: The enticing away branch, too? His Lordship: Certainly. Mr. Lobb: The point is, that if criminal conversation is barred by the statute, there remains another cause of action which may be a continuing cause of wrong. That is, taking the wife away innocently and harbouring her. His Lordship: I do not think the jury may be called back on that at all. Mr. Heyd, counsel for the plaintiff, objects that his Lordship should have told the jury that continuing to live with the plaintiff's wife in adultery was a continuing enticing."



**Statement.**

It was conceded that the cause of action for the conversion of the plaintiff's goods was barred by the statute.

The jury found for the plaintiff, and assessed the damages at fifteen hundred dollars, and judgment was given accordingly ; and from this judgment the defendant appealed.

The appeal was argued before ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, J.J.A., on the 19th of October, 1900.

*A. F. Lobb*, for the appellant.

*Heyd*, Q.C., for the respondent.

November 13th, 1900. OSLER, J.A. :—

The only question in the case is whether the cause of action for criminal conversation with the plaintiff's wife is barred by the Statute of Limitations. I think it must be taken on a fair reading of the charge that the learned trial Judge withdrew from the consideration of the jury all other causes of action as having been barred by the statute, and told them that, if they thought the plaintiff was entitled to recover, they must confine the damages to such as they might think he had sustained within the period of six years next before the commencement of the action. I am of opinion that the ruling was right, and that the plaintiff is in law entitled to maintain the action in respect and on proof of acts of adultery committed between his wife and the defendant at any time within that period, even though it may have appeared that the first act of adultery and the elopement of the wife with the adulterer occurred more than six years before action. The old form of pleading in this action, whether it was treated as in trespass or on the case, furnishes as good a test as can be applied as to what is the real issue in such a case. The allegation was that the defendant heretofore, to wit, on, etc., and on divers other days and times between that day and the commencement of this suit, debauched

and carnally knew the said E. F., then and there, and still being, the wife of the plaintiff: Chitty on Pleading, vol. 2, p. 742 and note (*d*), and p. 855 and note (*a*). And the plea of the Statute of Limitations in such a case was and is that the causes of action in the declaration mentioned did not, nor did any of them, accrue at any time within six years next before the commencement of the suit. Or, if the action was laid in trespass, that the defendant was not guilty of the said several supposed trespasses in the declaration mentioned, or of any or either of them, or of any part thereof, at any time within six years next before the commencement of this suit: Chitty, vol. 3, pp. 1030 (*a*), 1067.

In Stephen's N.P., vol. 1, p. 25, Tit. Adultery, it is said: "Where the Statute of Limitations has been pleaded, so as to exclude the recovery of damages for adulterous intercourse which took place a greater distance of time than six years previous to the commencement of the action, it has been held that anterior acts of adultery are still evidence for the purpose of shewing the nature of the connection which subsisted within the six years." For this is cited *Duke of Norfolk v. Germaine* (1692), 8 St. Trials 27; S.C. 12 Howell's St. Trials, cols. 927, 929, 983, 939, 945, 948. I refer also to Selwyn's N.P. pp. 9, 10; *Sanborn v. Gale* (1894), 162 Mass. 412.

It has been contended, and in the case of *Weedon v. Trimbrell* (1793), 5 T.R. 357, it was held, that where the plaintiff and his wife had agreed to live separately, the action was not maintainable for acts of adultery committed after the separation, because the gist of the action was the loss of the comfort and society of the wife, and, therefore, a declaration alleging such loss was not supported by the evidence. That case, however, has been much observed upon, and in subsequent cases distinguished or not followed, or supported on the ground that it appeared that the husband had given up all claim to the benefit to be derived from the society and assistance of the wife: *Chambers v.*

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*Caulfield* (1805), 6 East 244; *Winter v. Henn* (1831), 4 C. & P. 494. In the latter case, Alderson, J., told the jury: "I apprehend the law to be that the plaintiff will be entitled to recover unless he has, in some degree, been a party to his own dishonour, either by giving a general licence to his wife to conduct herself as she pleased with men generally, or by assenting to the particular act of adultery with this defendant, or by having totally and permanently given up all the advantage to be derived from her society. If you should be of opinion that the plaintiff has done any of these three things, then the defendant will be entitled to your verdict." See also *Izard v. Izard* (1889), 14 P.D. 45; *Bernstein v. Bernstein*, [1893] P. 292. And in the recent case of *Evans v. Evans*, [1899] P. 195, on the trial of a petition for divorce claiming damages, the trial Judge (the President of the Divorce Division) told the jury: "It cannot be denied that there have been thrown out at different times and in various cases, suggestions tending to shew that where a husband and wife have become separated, the husband cannot afterwards claim damages. That is not, however, the law . . . The breaking up of the matrimonial home is not by any means the only element, nor has it been considered by some authorities as even the chief element, to be considered in such cases as this. A man is wronged, by the seduction of his wife, far beyond the loss which he sustains by the breaking up of his home, however important an element of damage this may be. It is a matter for consideration, whether a man, whose wife has been seduced by another man, has not been subjected to intolerable insult and wrong; and the fact that he has already parted from his wife at the time when the adultery was committed does not render the blow to his honour less acute—does not render the position of his child or children less serious. That appears to me to be the law." No doubt these observations were not made in reference to a defence arising under the Statute of Limitations, but they shew the principle on which damages are

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given in such actions, and if mere separation by consent is no answer, it seems *a fortiori* that the long continuance of the adultery for a series of years up to the commencement of the action can be none either, unless the jury can infer therefrom that the husband has consented to abandon his wife to the seducer and has, in the language of Alderson, J., "totally and permanently given up all the advantage to be derived from her society." Had the wife and the seducer eloped together more than six years before action, then separated, and then, within six years before action, renewed the adulterous intercourse, it can hardly be doubted that the husband might have sued for the later adultery as giving rise to a cause of action; and I am unable to see what difference in principle it can make, that, instead of separating, the parties have continued to live together. The elopement of the wife from the matrimonial roof is no part of the cause of action. That is not what is meant by loss of consortium: *Lellis v. Lambert* (1897), 24 A.R. 653. The action is maintainable though the husband and wife have continued to live under the same roof—though the husband may have condoned the adultery, and even though there may have been a divorce *a mensâ et thoro*. Except as supporting a defence on the ground of abandonment, the authorities I have examined afford no support to the contention that mere delay on the part of the husband in bringing the action is a bar where the parties have continued to live in adultery down to the commencement of the action. I refer also to the judgment of Wilson, J., in *Patterson v. McGregor* (1869), 28 U.C.R. 280, 288.

It is said that if the plaintiff had brought his action within the six years his damages would have been assessed once for all, and that this shews that no new or continuing cause of action could arise from the continuance of the adulterous connection. I do not think it necessary to decide that. It may be that if such an action had been brought and damages recovered, the plaintiff, in the absence



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of any renewal of their marital relationship, ought to be taken to have finally abandoned his wife's society. But where there has been nothing but delay on his part in bringing any action, I fail to see how, except as constituting a defence on the merits apart from the statute, that deprives the husband of his right of action for criminal conversation occurring within the statutory period.

I am, therefore, clearly of opinion that, whatever other defence the facts proved in the case might have admitted of, they do not support that of the Statute of Limitations, as the defendant is proved to have been living in adultery with the plaintiff's wife in this country up to the time the action was brought, or within six years next before that time. This is the cause of action proved for the which the damages were, or ought to have been, given, and not the adultery committed in England when the parties eloped together to this country in 1886.

MACLENNAN, J.A. :—

The only question in this appeal is whether the action is barred by the Statute of Limitations.

It is not a case of a single criminal act, or a succession of them at intervals, but a case of elopement more than six years before action, and a cohabitation continued ever since, without the consent of the plaintiff.

No doubt in the case of a single criminal act, an action would be barred in six years. But there may be a repetition of such wrongs. Nor could it be said that the consortium having been lost by the first, was gone for ever, and that no action could be brought for the subsequent acts. Suppose such a wrong committed, and an action brought, and damages recovered, can it be that if the wrong is afterwards repeated no action would lie, and that the wrongdoer has, in effect, purchased the right of repeating it, whenever he pleases, with impunity? That, certainly, cannot be the law, and it follows that every

repetition of the wrong is a new injury, and a new cause of action, against each of which the statute runs independently, from the date of its commission. Then can it make any difference that it is a case of elopement, and subsequent continuous cohabitation? I am unable to see that it does. The consent of the wife makes no difference, for that is a wrong on her part; and the subsequent cohabitation is merely a repetition, every day, of the same wrong. It is like the case of false imprisonment, and other cases of continuing damage, such as building, or casting rubbish, upon a neighbour's land, in respect of which a new action might be brought every day as long as it continued. In *Winsmore v. Greenbank* (1745), Willes 577, at p. 584, the Chief Justice said: "Every moment that a wife continues absent from her husband without his consent, it is a new tort, and every one who persuades her to do so does a new injury, and cannot but know it to be so." That was said in a case of mere enticing, and inducing a wife to desert her husband, and to remain absent from him, and not a case of criminal conversation; but in my opinion the proposition of law laid down must be *a fortiori*, when there is not only desertion but cohabitation. See *Holmes v. Wilson* (1839), 10 A. & E. 503; *Battishill v. Reed* (1856), 18 C.B. 696, at pp. 712, 716, 718; *Ross v. Hunter* (1882), 7 S.C.R. 289, at pp. 311, 313; Addison on Torts, 7th ed., pp. 56, 361, 591; Pollock on Torts, 4th ed., p. 346.

I think the appeal should be dismissed.

Moss, J.A.:—

Notwithstanding Mr. Lobb's able argument, I am unable to agree with him that the plaintiff's cause of action for criminal conversation is completely barred by the Statute of Limitations.

It seems to be undisputed that if the defendant's guilty connection with the plaintiff's wife had been carried on from 1886 down to the commencement of this action with-

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out the wife ceasing to live with the plaintiff, and without his knowledge, he might recover damages for the acts committed within six years. Indeed, this is manifest from the rulings in the *Duke of Norfolk's* case, and subsequent decisions.

The elopement with the defendant, though preceded by adultery, did not deprive the plaintiff of all interest in his wife's future life and conduct. He did not thereby cease to be her husband, nor did she cease to be his wife. He might, of course, have brought an action and recovered damages. But a judgment against the defendant would not have given him a right to continue the intercourse.

The plaintiff might have received his wife back even after that. Suppose he had done so, and that subsequently the defendant had resumed his intercourse with her, could not the plaintiff have maintained another action? Could the defendant have succeeded upon a defence of judgment recovered? Then, unless it is to be held that the defendant's possession of the plaintiff's wife for more than six years deprived the plaintiff of all right or interest in her, is there any sound answer to his complaint that he is injured and wronged so long as the intercourse is maintained?

It cannot be maintained upon the evidence that the plaintiff consented to the acts of intercourse complained of, or gave his wife a general license to conduct herself with the defendant or other men as she saw fit, or to live the life of a common prostitute.

It has long been the law that if a wife is separated from her husband without his consent, and while separate is guilty of adultery, the adulterer is liable to the husband. This is upon the ground that the action does not rest upon the deprivation of the wife's affections, society, and services, though this may properly be shewn in aggravation of the damages, but upon the injury done to the husband by the defilement of his wife, the invasion of his exclusive right to marital intercourse, and the consequences resulting therefrom.

Every violation of these rights inflicts a new wrong upon the husband, and though in time the consequent damages may diminish, the right of action continues. Here the adulterous intercourse is shewn to have continued down to a period well within six years before the commencement of the action, and I think the plaintiff is entitled to maintain the action for the injury done him during that time.

I would dismiss the appeal.

LISTER, J.A. :—

I am of the same opinion.

ARMOUR, C.J.O. :—

The learned Chief Justice, if I understand rightly what took place after the delivery of his charge to the jury, coupled with the fact that he gave the jury no directions as to the cause of action for enticing away the plaintiff's wife, excluded that cause of action from their consideration altogether and confined their consideration to the cause of action for criminal conversation, and if he was wrong in doing so, this would be a ground for a new trial.

But I think he was right in this, for, in my opinion, there was no evidence which ought properly to have been submitted to the jury in support of that cause of action.

The cause of action for enticing away a wife is essentially different from the cause of action for criminal conversation with a wife.

The former is brought, on the assumption of the wife's innocence, for the purpose of procuring her return to her husband, and for damages for his *temporary* loss of consortium, and every day she is procured by her enticer to remain away from her husband a new tort is committed by the enticer: *Winsmore v. Greenbank* (1745), Willes 577.

And because the law assumes that she will return to her husband the damages are restricted to his loss of con-

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sortium up to the commencement of the action, and no damages for loss of consortium beyond that time are assessable, for new actions may be brought from time to time as long as the enticement continues: *Hambleton v. Veere* (1670), 2 Wms. Saund. 491; *Lewis v. Peachy* (1862), 1 H. & C. 518.

The latter is brought on the assumption of the wife's guilt, and not for the purpose of procuring her to return to her husband, and for damages for his *permanent* loss of consortium, and because the law assumes that the husband will never condone his wife's adultery the damages are unrestricted, and the husband is held entitled to recover damages for his permanent loss of consortium, and such damages are assessable once for all.

The consequences flowing from the adultery being assumed by the law to be the permanent loss of consortium, the continuing the adultery gives rise to no new action, for the gist of the action is the loss of consortium, which being totally lost by the adultery, the continuance of the adultery is not a new injury or wrong: *Hodsoll v. Stallebrass* (1840), 11 A. & E. 301.

No case can be found in England, either before or since the establishment of the Divorce Court, in which the damages for criminal conversation have ever been restricted to those arising before and up to the commencement of the action, and the damages in such case have invariably been assessed once for all, and it has never been held that the continuance of the criminal conversation is a new injury and wrong and gives rise to a new action.

Under these circumstances, I do not think it wise to depart from the old ways and to set up a new precedent in actions of this kind.

If there is any analogy between actions for false imprisonment and actions of this kind, the case of *Violett v. Sympson* (1857), 8 E. & B. 344, affords the nearest analogy.

I do not think any argument can be founded on the ancient form of the action, for trespass and case were both adopted indiscriminately: *Chamberlain v. Hazlewood* (1839), 5 M. & W. 515. Judgment.  
ARMOUR, C.J.O.

In the case in hand the plaintiff had in 1886 a complete cause of action against the defendant; the criminal conversation was then had, he then lost the consortium of his wife, and he was then entitled to recover damages for the permanent loss of such consortium, and all the damages, present and prospective, resulting from such criminal conversation, and this action not having been commenced within six years after the cause of action arose, is barred by the Statute of Limitations: *Sanborn v. Gale* (1894), 162 Mass. 412.

If he had then brought his action and had then recovered judgment it could not well be argued that such judgment was no bar to a subsequent action.

If the view is to prevail that the continuance of the criminal conversation is to afford a fresh cause of action *de die in diem*, the damages in this case were wrongly assessed, for in such case they ought only to have been assessed down to the time of the assessment: Cons. Rule 552.

The contention that an action cannot be brought in this Province against a defendant residing here for a criminal conversation had in England is not tenable.

It is true that by the Imperial Act, 20 & 21 Vict. ch. 85, sec. 59, it was provided that after that Act should come into operation no action should be maintainable in England for criminal conversation, but criminal conversation still remained in England a wrongful act, and another remedy was provided for it by sec. 33 of the same Act.

Criminal conversation, therefore, being a wrongful act or tort both in England and in this Province, an action can be brought here against a defendant residing here for a criminal conversation had in England, and it is no objection to an action, brought here in proper form, that it

Judgment. would have been brought in a different form in England :  
ARMOUR, C.J.O. *Phillips v. Eyre* (1870), L.R. 6 Q.B. 1 ; *The M. Moxham*  
(1875), 1 P.D. 43 ; *Chartered Mercantile Bank v. Nether-*  
*lands India Steam Navigation Co.* (1883), 10 Q.B.D. 521 ;  
*General Steam Navigation Co. v. Guillou* (1843), 11 M. &  
W. 877 ; *The Halley* (1868), L.R. 2 P.C. 193 ; *Machado v.*  
*Fontes*, [1897] 2 Q.B. 231.

In my opinion, therefore, the appeal must be allowed,  
with costs, and the action dismissed, with costs.

*Appeal dismissed, ARMOUR, C.J.O., dissenting.*

R. S. C.

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END OF VOLUME XXVII.

## APPENDIX.

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Cases reported in the Ontario Appeal Reports disposed of by the Supreme Court of Canada since the publication of volume 26, up to December 31st, 1900.

ARMSTRONG v. LYE, 27 A.R. 287.—Appeal dismissed; December 7th, 1900.

ATKINSON v. CHATHAM, 26 A.R. 521.—Appeal allowed; November 13th, 1900: *sub nom.* BELL TELEPHONE Co. v. CHATHAM.

BUGBEE v. CLERGUE, 27 A.R. 96.—Appeal dismissed; November 13th, 1900: *sub nom.* CLERGUE v. HUMPHREY.

IN RE CANADIAN PACIFIC R. W. Co. and TORONTO, 27 A.R. 54.—Appeal quashed; May 30th, 1900.

CASTON v. CITY OF TORONTO, 26 A.R. 459.—Appeal dismissed; June 12th, 1900: 30 S.C.R. 390.

DUEBER WATCH CASE Co. v. TAGGART, 26 A.R. 295.—Appeal dismissed; June 12th, 1900: 30 S.C.R. 373.

DUNN v. PRESCOTT ELEVATOR Co., 26 A.R. 389.—Appeal dismissed; October 8th, 1900: 30 S.C.R. 620.

ECKARDT v. LANCASHIRE FIRE INS. Co., 27 A.R. 373.—Appeal dismissed; November 13th, 1900.

GUTHRIE v. CANADIAN PACIFIC R.W. Co., 27 A.R. 64.—Appeal allowed; June 1st, 1900.

IN RE LEAK and TORONTO, 26 A.R. 351.—Appeal dismissed; April 21st, 1900: 30 S.C.R. 321.

ROMBOUGH v. BALCH, 27 A.R. 32.—Appeal dismissed June 12th, 1900.



RYAN V. WILLOUGHBY, 27 A.R. 135.—Appeal dismissed ;  
November 12th, 1900.

SUTHERLAND-INNES CO. V. ROMNEY, 26 A.R. 495.—  
Appeal allowed ; October 4th, 1900 : 30 S.C.R. 495.

**A DIGEST**  
OF ALL THE  
CASES REPORTED IN THIS VOLUME  
BEING DECISIONS IN THE  
**COURT OF APPEAL FOR ONTARIO.**

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**ACCEPTANCE.**

*See* SALE OF GOODS, 1.

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**ACCESS.**

*See* CRIMINAL LAW, 3.

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**ADMINISTRATION.**

*See* EXECUTORS AND ADMINISTRATORS.

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**AMENDMENT.**

*See* CRIMINAL LAW, 2—CROWN  
—DRAINAGE, 1—JUDGMENT.

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**ANNUITY.**

*See* WILL, 4.

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**APPEAL.**

*See* DRAINAGE, 1, 3.

**ARBITRATION AND AWARD.**

*See* MUNICIPAL CORPORATIONS, 1.

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**ASSESSMENT AND TAXES.**

1. *Street Railway — Rails, Poles, and Wires—Bridges — Road-bed — Adding Items on Appeal.*] — Although a street railway is operated as a continuous system through all the wards of a city, the portion of the rails, poles and wires, in each ward, must be assessed in that ward, and in making the assessment the rails, poles and wires, must be treated as material situate in the ward, and not as necessary portions of a going concern operated in several wards.

Bridges built and used by a street railway as part of their system are subject to assessment but must be assessed in the same way as the rails, poles and wires.

*Consumer's Gas Co. v. Toronto* (1896), 27 S.C.R. 453 ; *In re*

*Bell Telephone Company Assessment* (1898), 25 A.R. 351; and *In re Toronto Railway Company Assessment* (1898), 25 A.R. 135, applied.

Upon an appeal to the Board of County Judges from the Court of Revision coming on for hearing, the board, at the request of the city, and without any previous notice or assessment or application to the Court of Revision, added to the items of assessable property of a railway company, a certain amount as the value of the portion of the streets of the city "occupied" by the company:—

*Held*, that the Board of County Judges had no jurisdiction to make this addition, the amendment made by sec. 5 of 62 Vict. ch. 27 (O), not then being in force.

Judgment of the Board of County Judges reversed. *In re London Street Railway Co. Assessment*, 83.

2. *Exemptions*—"Public Hospital"—R.S.O. ch. 224, sec. 7 (5).—A hospital carried on by and for the benefit of two medical practitioners, and used chiefly by patients paying fees, though to some extent by indigent patients, and in receipt of a government grant under "The Charity Aid Act," R.S.O. ch. 320, is a public hospital within the meaning of sub-sec. 5 of sec. 7 of the Assessment Act, R.S.O. ch. 224, and exempt from taxation.

Judgment of MEREDITH, C.J., 30 O.R. 116, affirmed. *Struthers v. Town of Sudbury*, 217.

3. *Distress—Change of Ownership—Chattel Mortgage—Purchase from Mortgagee*—R.S.O. ch. 224, sec. 135, sub-sec. 4 (b).]—Goods purchased from the chattel mortgagee thereof are not "claimed . . . by purchase, gift, transfer, or assignment" from the mortgagor within the meaning of R.S.O. ch. 224, sec. 135, sub-sec. 4 (b), so as to make them liable in the purchaser's hands to distress for taxes due by the mortgagor.

Judgment of MEREDITH, C.J., 31 O.R. 301, affirmed. *Horsman v. City of Toronto*, 475.

See LANDLORD AND TENANT, 2.

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## ASSIGNMENTS AND PREFERENCES.

See BANKRUPTCY AND INSOLVENCY.

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## AUCTIONEER.

See MUNICIPAL CORPORATIONS, 3.

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## BANKRUPTCY AND INSOLVENCY.

*Assignments and Preferences—Contestation of Claim—Discontented Creditor—Composition—Fraud—Bills of Exchange and Promissory Notes—Endorsement.*]—An insolvent made a compromise with his creditors,

borrowing from his wife the money to pay the composition. She borrowed the money from one of his creditors, agreeing to pay a bonus of a large amount and giving to the creditor for his composition payment and the bonus her promissory notes endorsed by her husband, with a mortgage on her real estate, and a chattel mortgage on his stock, as collateral security. The creditor signed the composition agreement, nothing being said about the bonus to the other creditors, who knew, however, that some arrangement had been made with this creditor for the supply of the necessary funds. The insolvent, after carrying on business for some time and incurring further liabilities, made an assignment for the benefit of his creditors:—

*Held, per BURTON, C. J. O.,* agreeing with the judgment of MACMAHON, J., at the trial, that the transaction with the wife was valid and not a fraud on the composition, and that the creditor was entitled to rank upon the notes against the estate in the hands of the assignee as far as this question was concerned.

But the notes in question having been made by the insolvent's wife, payable to the creditor's order, and having been endorsed by the insolvent before they were handed to the creditor:—

*Held, per Curiam,* on objection taken in this Court, that

the insolvent was not liable as endorser and that the creditor could not rank on his estate.

*Semble, per BURTON, C. J. O.* An objection on either ground to such a claim to rank cannot be taken under sec. 9 of the Act by a dissentient creditor for his own benefit against the wishes of the assignor and the majority of the creditors, and an order purporting to be made under that section allowing the dissentient creditor to contest the claim in the assignee's name is invalid. *Small v. Henderson*, 492.

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## BANKS.

*See* BILLS OF EXCHANGE.

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## BENEVOLENT SOCIETY.

*See* INSURANCE, 2.

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## BILLS OF EXCHANGE AND PROMISSORY NOTES.

*Cheque—Marking by Bank—Alteration—Forgery—Banks and Banking—Clearing House.*]

—A customer having a deposit account with the plaintiff bank drew a cheque upon that bank payable to cash or bearer for five dollars and had it "marked" by the ledger-keeper. He then altered it so as to make it apparently a cheque for five hundred dollars, it being in such form as to enable this to be done readily, and then deposited



it with the defendant bank, obtaining from them by his cheques upon them the sum of five hundred dollars. The following day the defendant bank sent the cheque to the Clearing House in the usual course of business, and there in adjusting the balances it was charged against the plaintiff bank as a cheque for five hundred dollars. On the next morning, when in the usual course of banking business at the place in question, the "marked" cheques received on the previous day from the Clearing House were being checked with the deposit ledger, the alteration was discovered, and the plaintiff bank at once gave notice to the defendant bank and demanded payment of four hundred and ninety-five dollars:—

*Held*, that the alteration of the cheque by the drawer after it had been "marked" was forgery; that the plaintiff bank was not responsible on the ground of negligence for the subsequent fraud of the drawer; that even if the adjustment of the balances in the Clearing House constituted payment of the cheque, the notice given on the following day before the defendant bank altered its position or lost any recourse against other parties was in time, and that therefore the plaintiff bank was entitled to recover.

*London and River Plate Bank v. Bank of Liverpool*, [1896] 1 Q.B. 7, considered.

Judgment of MACMAHON, J., 31 O.R. 100, affirmed, ARMOUR, C.J.O., dissenting. *Bank of Hamilton v. Imperial Bank*, 590.

See BANKRUPTCY AND INSOLVENCY.

### BRIDGES.

See ASSESSMENT AND TAXES, 1.

### BY-LAW.

See MUNICIPAL CORPORATIONS, 2.

### CASES.

*In re Bell Telephone Company Assessment*, 25 A.R. 351, applied.]—See ASSESSMENT AND TAXES, 1.

*Broughton v. Grey and Elma*, 27 S.C.R. 495, distinguished.]—See DRAINAGE, 2.

*Cavanagh v. Park*, 23 A.R. 715, applied.]—See MASTER AND SERVANT, 4.

*Consumers Gas Co. v. Toronto*, 27 S.C.R. 453, applied.]—See ASSESSMENT AND TAXES, 1.

*Hamilton v. Groesbeck*, 19 O.R. 76, no longer authority.]—See MASTER AND SERVANT, 4.

*In re Harwick and Raleigh*, 21 A.R. 677, distinguished.]—See DRAINAGE, 2.

*Itter v. Howe*, 23 A.R. 256, enforced.]—See TRUST.

*Lawlor v. Lawlor*, 10 S.C.R. 194, applied.]—See ESTATE.

*London and River Plate Bank v. Bank of Liverpool*, [1896] 1 Q.B. 7, considered.]—See **BILLS OF EXCHANGE**.

*In re Oxford & Howard*, 18 A.R. 496, distinguished.]—See **DRAINAGE**, 2.

*Plomley v. Felton*, 14 App. Cas. 61, distinguished.]—See **ESTATE**.

*In re Toronto Railway Company Assessment*, 25 A.R. 135, applied.]—See **ASSESSMENT AND TAXES**, 1.

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### **CERTIFICATE.**

See **COMPANY**, 1.

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### **CERTIORARI.**

See **CRIMINAL LAW**, 1, 2.

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### **CHATTEL MORTGAGE.**

See **ASSESSMENT AND TAXES**, 3.

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### **CHEQUE.**

See **BILLS OF EXCHANGE**.

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### **CHURCH.**

*Expulsion of Minister—Domestic Forum.*]—The Court cannot interfere with the action taken by the duly constituted tribunals of a church in expelling a minister, when these tribunals have proceeded in accordance with the rules, regulations and discipline of the

church, and the accused has had the opportunity of defending himself.

Judgment of **MEREDITH, J.**, affirmed. *Ash v. Methodist Church*, 602.

See **TRUST**.

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### **CLEARING HOUSE.**

See **BILLS OF EXCHANGE**.

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### **CO-INSURANCE.**

See **INSURANCE**, 1.

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### **COMPANY.**

1. *Shares—Issue at a discount—Payment for Services—Transfer—Certificate—R.S.C. ch. 119, ss. 27, 48, 55.*]—Where shares in a company incorporated under the Dominion Joint Stock Companies' Act, R.S.C. ch. 119, were applied for, and the applicants paid to the company an amount equal to the face value of the shares, but at the same time received from the company a portion of the price as alleged consideration for services to be rendered by them to the company at a future date, it was held, in a judgment creditor's action, that the shares, to the extent of the amounts so allowed, must be treated as up-paid shares.

Judgment of **MACMAHON, J.**, affirmed.

Where, without any transfer in writing being executed, certificates of shares issued under the above circumstances were surrendered by the original holder to the company, and new certificates were issued at his request by the company to the alleged transferee, it was held, having regard to section 48 of the Act and the by-laws of the company, that the original holder had not divested himself of liability to a judgment creditor of the company suing under section 55 of the Act.

Judgment of MACMAHON, J., reversed. *Union Bank v. Morris*, 396; *Union Bank v. Code*, 396.

2. *Reserve Fund—Dissentient Minority—President—Purchase for Company—Secret Profit—Directors—Salaries.*]

An ordinary trading company can, without special authority, set apart a reserve fund, but the majority of the shareholders cannot, against the wishes of the minority, accumulate out of the profits a reserve fund which is far larger than is required to provide for all liabilities of, and vicissitudes in, the business; and where such a fund had been accumulated and portions of it had from time to time been invested, by the directors elected by the majority, in unauthorized and hazardous investments, the Court, at the instance of the minority, ordered a reasonable proportion to be set aside as a

reserve fund and the balance to be distributed among the shareholders as undrawn profits.

Judgment of ARMOUR, C.J., varied.

The president of a company cannot, unless with the consent of all the shareholders, make a profit by selling to the company a property which he knows the company requires and which he buys, with that knowledge, for the express purpose of selling to it.

Judgment of ARMOUR, C.J., affirmed.

The president and vice-president of a company drew for several years, without proper authority but with the acquiescence of their co-directors, elected by, and closely connected with, the majority of the shareholders, large sums, ostensibly as salaries as general manager and managing director respectively:—

*Held*, that the propriety of the payments could be inquired into at the instance of dissatisfied shareholders, although the majority were prepared to ratify them.

Judgment of ARMOUR, C.J., reversed. *Earle v. Burland*, 540.

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### COMPENSATION.

*See* DITCHES AND WATER-COURSES ACT, 1.

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### COMPOSITION.

*See* BANKRUPTCY AND INSOLVENCY.

**CONDITION PRECEDENT.**

*See* CONTRACT, 2.

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**CONDITIONS.**

*See* INSURANCE, 2.

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**CONSENT.**

*See* CRIMINAL LAW, 1.

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**CONTESTATION OF CLAIM.**

*See* BANKRUPTCY AND INSOLVENCY.

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**CONSTITUTIONAL LAW.**

*See* CROWN.

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**CONTRACT.**

1. *Mineral Rights—Right to Possession.*—By an agreement made on the 13th of January, 1897, in consideration of one dollar, the owner of certain lands agreed "to lease and hereby does lease to (the plaintiff) the following described premises," mentioning them, and "hereby leases and agrees to give and convey hereby to said (plaintiff) all mineral rights on said premises, the right to quarry stone and the right to bore for gas, with privilege to erect and bring on to said premises all necessary tools, machinery and conveniences for mining, quarrying and boring on said premises,

and to erect buildings thereon for said tools and machinery and for housing employees, and also to drain said premises and to build necessary railroad thereon."

"Said (plaintiff) also agrees if he uses said property under this agreement to take therefrom the amount of 50,000 cords of stone, and to pay therefor the sum of 25 cents per cord per United States specifications. Said (owner) hereby agrees that he will give no other party or corporation any rights on said premises for the above described purposes on or before August 1st, 1897."

"Unless said (plaintiff) utilizes said premises for said purposes on or before August 1st, 1897, this lease shall be null and void:—"

*Held*, affirming the judgment of BOYD, C., that under this agreement the plaintiff was not entitled to exclusive possession of the land, or to quarry all the stone thereon, but only to quarry 50,000 cords. *Haven v. Hughes*, 1.

2. *Breach—Condition Precedent—Inability to Perform—Municipal Corporations—Resignation of Councillor—Disqualification of Councillor.*—The defendant, who was a municipal councillor, entered into a sub-contract with the plaintiff to do the brick and mason work under the plaintiff's contract with the municipality



to build a town hall, that contract providing that the contractor should not sub-let the work or any part thereof without the consent in writing of the architect and municipality, and this consent the plaintiff was to obtain. The municipality refused to consent to the sub-contract on the ground that the defendant's services would be of value in the oversight of the contract:—

*Held*, that there could not be imported into the defendant's sub-contract an agreement to resign his seat, as such an agreement to resign a public trust for private gain would be contrary to public policy and illegal, and that the defendant was not liable in damages because of the breach of an implied obligation to resign, though his resignation might, as the plaintiff contended, have enabled the plaintiff to fulfil the condition precedent on his part of obtaining the municipality's consent.

*Semble*: If the sub-contract had taken effect the defendant would have been, under section 80 (1) of the Municipal Act, R.S.O. ch. 223, disqualified.

Judgment of a Divisional Court, 30 O.R. 411, reversed. *Ryan v. Willoughby*, 135.

3. *Breach—Agreement not to Practise Medicine—Damages—Injunction.*]—By an agreement under seal the defendant sold to the plaintiff a house and the goodwill of his medical practice

for \$2100, and the defendant “(bound) himself in the sum of \$400, to be paid to the (plaintiff) in case the (defendant) shall set up or locate himself in the practice of medicine or surgery within the space of five years from the date hereof within a radius of five miles from the said village”:—

*Held*, that there was an implied agreement by the vendor not to resume practice; that the sum of \$400 was payable as liquidated damages on the breach of the agreement; and that the purchaser was entitled to that sum or to an injunction, but not to both.

Judgment of ROBERTSON, J., 31 O.R. 91, varied. *Snider v. McKelvey*, 339.

#### 4. *Manufacture and Sale of Chattels—Breach—Damages.*]

—Five days after making a contract with the plaintiffs for the manufacture by them of a large number of shells for electric light lamps, to be delivered monthly for a period of twenty months, the defendants notified the plaintiffs that they would not carry out the contract. The plaintiffs had done nothing towards performing the contract, and had incurred no expense with reference to it:—

*Held*, that though the plaintiffs were entitled to bring an action at once to recover damages, they should not be allowed as damages the full amount of their expected profit, but that

allowance should be made for the many contingencies which might have happened before the time for fulfilment.

The Court, after stating the general principles and pointing out some of the contingencies, reduced the amount of damages allowed by MEREDITH, C. J. — *Ontario Lantern Company v. Hamilton Brass Manufacturing Company (Limited)*, 346.

See MUNICIPAL CORPORATIONS, 5.

### CONVERSION.

*Tenant in Common—Removal of Chattel to foreign Country.*—An action for conversion of his interest in a chattel lies by one tenant in common against his co-tenants in common if the chattel owned in common is destroyed by them, or so dealt with by them as, in effect, to put an end to his rights.

In this case the removal of a brick making machine to a foreign country was held sufficient to support the right of action, the plaintiff's power of enforcing his rights in the Courts of this Province being thus interfered with.

Judgment of a Divisional Court reversed. *McIntosh v. Port Huron Petrified Brick Company*, 262.

### CONVICTION.

See CRIMINAL LAW, 2.

### COURT OF APPEAL.

See DRAINAGE, 1.

### COVENANT.

See LANDLORD AND TENANT, 2.

### CRIMINAL CONVERSATION.

See HUSBAND AND WIFE.

### CRIMINAL LAW.

1. *Summary Trial—Habeas Corpus—Certiorari—Evidence—Depositions in Other Proceedings—Counsel's Consent—Public Morals—Keeping House of Ill-fame.*—A conviction by a magistrate under the sections of the Criminal Code relating to the summary trial of indictable offences may be brought up for review by writs of *habeas corpus* and *certiorari*.

Upon the hearing of a charge under these sections evidence in other proceedings against another prisoner is admissible upon the consent of the accused's counsel.

Nature of evidence to prove a charge of being an inmate of a house of ill-fame, considered.

Judgment of FALCONBRIDGE, J., affirmed. *Regina v. St. Clair*, 308.

2. *Conviction—Certiorari—Amendment—Criminal Code, sec. 889—Indian Act.*—Under sec. 889 of the Criminal Code, the Court, if a conviction under

any Act to which the procedure in the Code applies, and for an offence over which the convicting magistrate has jurisdiction, is brought up by *certiorari* (whether in aid of a writ of *habeas corpus* or on motion to quash the conviction is immaterial) may hear and determine the charge as disclosed by the depositions upon the merits, and may confirm, reverse, vary, or modify the decision.

A conviction under the Indian Act, defective on its face, was amended by describing the offence accurately, and by substituting for imprisonment for six months and a fine of \$50 and \$5 costs, or imprisonment for a further term of six months in default of payment of the costs or in default of sufficient distress, imprisonment for six months and a fine of \$50 and \$5 costs or imprisonment for a further term of three months in default of payment of the fine and costs.

Judgment of STREET, J., affirmed. *Regina v. Murdock*, 443.

3. *Trespass—Damage to Property*—“Fair and Reasonable Supposition of Right”—R.S.O. ch. 120, sec. 1—Criminal Code, sec. 511—Water and Water-courses—Access to Shore—Crown Grant.]—The honest belief of a person charged with an offence under R.S.O. ch. 120, sec. 1 (unlawfully trespassing), or the Criminal Code, sec. 511

(wilfully committing damage to property), that he had the right to do the act complained of, is not sufficient to protect him; there must be fair and reasonable ground in fact for that belief.

The usual reservation in a patent of land bounded by navigable water of “free access to the shore for all vessels, boats and persons,” gives a right of access only from the water to the shore, and in this case it was held that a person who had broken down fences and had driven across private property to the shore, could not successfully assert, when charged under R.S.O. ch. 120, sec. 1, and the Criminal Code, sec. 511, that he had “acted under a fair and reasonable supposition of right” in so doing.

Judgment of a Divisional Court affirmed. *Regina v. Davy*, 508.

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## CROSSINGS.

See PRESCRIPTION.

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## CROWN.

*Timber Licenses*—“Manufacturing Condition”—Constitutional Law—61 Vict. ch. 19 (O.)—Practice—Petition of Right—Amendment.]—The Act, 61 Vict. ch. 19 (O.), making applicable to timber licenses the condition approved by order-in-council of the 17th of February,

1897, that all pine timber cut under such licenses shall be manufactured into sawn lumber in Canada, is *intra vires*, and applies to licenses issued after the passing of the Act in renewal of licenses in force at the time of its passage.

The rights acquired under sales and licenses of timber limits under "The Crown Timber Act" considered.

A petition of right may be amended at the trial.

Judgment of STREET, J., 31 O.R. 202, affirmed. *Smylie v. The Queen*, 172.

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### **CROWN GRANT.**

See CRIMINAL LAW, 3.

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### **DAMAGES.**

See CONTRACT, 3, 4—HUSBAND AND WIFE—MASTER AND SERVANT—MUNICIPAL CORPORATIONS, 4—NEGLIGENCE—SALE OF GOODS, 2.

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### **DECLARATORY JUDGMENT.**

See PRINCIPAL AND SURETY.

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### **DEDICATION.**

See HIGHWAY.

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### **DELIVERY.**

See SALE OF GOODS, 1.

### **DIRECTORS.**

See COMPANY, 2.

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### **DISCRETION.**

See LANDLORD AND TENANT, 2.

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### **DISTRESS.**

See ASSESSMENT AND TAXES, 3.

### **DITCHES AND WATERCOURSES ACT.**

*Municipal Corporations — Compensation.*]— A municipal corporation is an "owner," within the meaning of the Ditches and Watercourses Act in respect of highways under its jurisdiction, and as such may initiate proceedings under that Act.

Where it has, pursuant to an award in proceedings initiated by it under that Act, constructed, without negligence, a drain from a highway to a river through an adjoining owner's land, it is not liable to make compensation under the Municipal Act to that adjoining proprietor in case his land has been injuriously affected by the drain.

Judgment of the Official Arbitrator reversed. *In re McLellan and Township of Chinguacousy*, 355.

2. *Railway.*] — An award under the Ditches and Watercourses Act directed that a drain should be built by the initiating owner a certain distance along a



highway of the defendants, then by the defendants along the highway to a point opposite the land of a railway company, then by another land owner, and then by the railway company along the highway, or across the highway through their own land, as far as might be necessary to give a proper outlet. The drain was built by contract under the Act as far as the point opposite the railway company's land, but the railway company, whose railway had been declared to be a work for the general advantage of Canada, refused to recognize the award or do the work directed. The defendants then built a culvert across the highway and brought the water to the railway company's land, and the railway company thereupon built an embankment to keep it back, the result being that it overflowed from the highway ditches and caused damage to the plaintiff:—

*Held*, that there was no jurisdiction under the Ditches and Watercourses Act as far as the railway company were concerned; that the award was therefore no protection to the defendants; that the damage resulted from the construction of the culvert; and that the defendants were liable therefor.

Judgment of ROSE, J., affirmed. *McCrimmon v. Township of Yarmouth*, 636.

## DOWER.

*Husband and Wife—Separation Deed—Jointure—Election—27 Hen. VIII., ch. 10, sec. 7.*

—On the 24th of July, 1868, the plaintiff and her husband and trustees on her behalf executed a deed which, after reciting that disputes had arisen between the husband and wife and that an action for alimony was pending, provided for the separation of the husband and wife and the conveyance of certain property by the husband to trustees for the benefit of the wife, and contained a number of covenants, one of which was a covenant by the trustees "that the said (wife) will, whenever called upon, release her dower in any lands of which he, the said (husband), may hereinafter (*sic*) acquire a title." The husband died in January, 1898, having acquired, and at the time of his death seized of, other lands, and in August, 1898, the wife brought this action claiming dower in these lands, having up to that time continued to have the beneficial use and possession of the lands mentioned in the deed of 1868:—

*Held*, that the deed of 1868 provided a jointure for the wife within the provisions of sec. 7 of 27 Hen. VIII., ch. 10; that the acceptance of the deed and the benefits thereby conferred was an election by her within that Act to accept the jointure; and that, therefore, she was not

## DOMESTIC FORUM.

*See* CHURCH.

entitled to dower in the after acquired lands.

Judgment of a Divisional Court, 30 O.R. 689, affirmed. *Eves v. Booth*, 420.

### DRAINAGE.

1. *Amendment of Engineer's Report—Jurisdiction of Referee—Appeal—Court of Appeal—R.S.O. ch. 226, secs. 89, 90.*—The Drainage Referee cannot, under sec. 89 of the Drainage Act, R.S.O. ch. 226, upon the admission of the initiating township that the report appealed from is defective, refer it back, against the wishes of the appealing townships, to the engineer for amendment.

Judgment of the Drainage Referee reversed.

An order assuming to refer back a report is not an interlocutory order within the meaning of sec. 90 of the Drainage Act, R.S.O. ch. 226, and an appeal lies to the Court of Appeal against it. *Townships of Adelaide and Warwick v. Township of Metcalfe*, 92.

2. *Injuring Liability—Natural Watercourse—R.S.O. ch. 226, sec. 3, sub-sec. 3.*—Under sub-sec. 3 of sec. 3 of R.S.O. ch. 226, lands in one municipality from which water has been caused to flow upon and injure lands in another municipality, either immediately, or by means of another drain, or by means of a natural water-

course, may be assessed and charged for the construction and maintenance of a drainage work required to relieve the injured lands from such water.

*In re Orford and Howard* (1891), 18 A.R. 496; *In re Harwich and Raleigh* (1894), 21 A.R. 677; and *Broughton v. Grey and Elma* (1897), 27 S.C.R. 495, distinguished.

Judgment of the Drainage Referee affirmed. *Township of Orford v. Township of Howard*, 223.

3. *Report of Engineer—Failure to Take Oath—Amendment of Report—R.S.O. ch. 226, secs. 5, 75.*—Taking the oath prescribed in sec. 5 of "The Municipal Drainage Act," R.S.O. ch. 226, is an essential prerequisite to the exercise of jurisdiction by the engineer under sec. 75 of the Act.

While an appeal to the Drainage Referee against a report is pending the initiating municipality cannot refer back the report to the engineer for amendment.

Judgment of the Drainage Referee reversed. *Township of Colchester North v. Township of Gosfield North*, 281.

### ELECTION.

*See* DOWER.

### ENTAIL.

*See* ESTATE.

**EQUITABLE CHARGE.**

See MERGER.

**ESTATE.**

*Estate Tail—Bar of Entail—Mortgage—Will—Construction.*]—By a will made in 1847 a testator, who died in 1854, devised to his son a piece of land, describing it, and proceeded: "All which shall be and is hereby entailed on my said son and his heirs for ever." In 1859 and again in 1860 the son granted the land in question in fee by way of mortgage, each mortgage being duly registered within less than six months of its execution and each containing the usual proviso that it should be void on payment at a named date. No discharge of either mortgage or reconveyance of the mortgaged land had been registered, and there was no evidence whether either mortgage had in fact been paid:—

*Held, per* MACLENNAN, and LISTER, JJ.A., that under this will the son took an estate tail;

But *held, also, per* Curium, that even if the son did take an estate tail, that estate had been barred and converted into an estate in fee simple in his own favour as well as in that of the mortgagee by the execution and registration of the mortgages.

*Lawlor v. Lawlor* (1882), 10 S.C.R. 194, applied, and *Plomley v. Felton* (1888), 14 App. Cas. 61, distinguished.

Judgment of FERGUSON, J., affirmed. *Culbertson v. McCullough*, 459.

See SETTLEMENT—WILL.

**EVIDENCE.**

*Negligence—Fire—Sparks from Steamer.*]—In an action to recover the value of buildings destroyed by fire, started, as was alleged, by sparks which escaped from the defective smokestack of a steamboat, evidence that on prior and subsequent days sparks of large size escaped from the smokestack is admissible to prove its defective construction, but opinionative evidence that having regard to the force and direction of the wind on the day in question sparks of this size, if they escaped, might have been carried to the building in question, is too conjectural and speculative.

Judgment of MEREDITH, C.J., affirmed. *Peacock v. Cooper*, 128.

See *Kelly v. Davidson*, 657—  
CRIMINAL LAW, 1—LANDLORD  
AND TENANT, 2—NEGLIGENCE, 2.

**EXECUTORS AND ADMINISTRATORS.**

*Trustees—Distribution of Estate—Unpaid Legatee—Contribution by Other Legatees—Limitation of Actions.*]—Legatees entitled to a share of the residue of an estate are not



bound by the accounts and proceedings in an administration action, instituted by other residuary legatees, in which they have not been added as parties, and of which they have received no notice. The judgment for administration in such an action, however, enures to their benefit, and makes a fresh starting point in their favour as against the defence of the Statute of Limitations.

In the absence of reasonable efforts by the executors of an estate to discover the whereabouts of certain persons entitled to share in the residue, other persons who have received a share of the residue must refund, for the benefit of the persons whose claims have been ignored, the amount received in excess of the sum payable if the division had been properly made.

Judgment of ARMOUR, C.J., affirmed. *Uffner v. Lewis*, 242; *Boys' Home v. Lewis*, 242.

2. *Notice to Claimants*—*R.S.O. ch. 129, sec. 38—Limitation of Actions—Trustee Limitation Act—Reversionary Interest—R.S.O. ch. 129, sec. 32—Trustee Relief Act—62 Vict. ch. 15 (O.)*.—A notice by executors that “all parties indebted to the estate of the late (testator) are required to settle their indebtedness” by a named date, and that “parties having claims against said estate are also re-

quired to file same by said date,” is not a sufficient notice within section 38 of *R.S.O. ch. 129* to protect the executors from liability for claims not brought to their knowledge until after the estate has been distributed by them.

Their liability in this respect extends to claims against their testator for money lost owing to a breach of duty by him as trustee.

Persons having a reversionary interest in a trust fund may bring an action to compel the trustee to make good money lost owing to his negligence, and the *Trustee Limitation Act, R.S.O. ch. 119, sec. 32*, does not run against them from the time of the loss but only from the time their reversionary interest becomes an interest in possession.

Judgment of STREET, J., 30 O.R. 110, affirmed.

After judgment had been given in the Court below against the executors in this case, the *Act for the Relief of Trustees, 62 Vict. ch. 15 (O.)*, was passed:—

*Held*, that, assuming the Act to apply to such a case, it did not relieve the executors, for they could not be held to have acted reasonably when they failed to follow the plain statutory directions as to notice to creditors and claimants. *Stewart v Snyder*, 423.

3. *Mortgage—Purchaser of Equity of Redemption—In-*



*demnity—Death of Mortgagor—Release of Purchaser.*—The administrators of the insolvent estate of a deceased mortgagor are not liable in damages to his mortgagee as upon a devastavit, because they release the purchaser of the equity of redemption in the mortgaged property from his liability to indemnify the mortgagor in respect of the mortgage, no claim having been made upon them by the mortgagee in respect of the mortgage.

Judgment of *BOYD, C.*, 30 O.R. 684, affirmed. *Higgins v. Trusts Corporation of Ontario*, 432.

4. *Negligence—Agent's Fraud—Limitation of Actions—Trustee Limitation Act—R.S.O. ch. 129, sec. 32.*—Executors, relying in good faith on the statement of their testator's solicitor that he had in his hands securities sufficient to answer a fund they were directed by the will to invest for an annuitant, distributed the estate. Subsequently it was found that before the testator's death the solicitor had misappropriated the money given to him by the testator to invest, and had, in fact, at the time of the representation, no securities or money in his hands:—

*Held*, that the executors were protected by the Trustee Limitation Act, R.S.O. ch. 129, sec. 32.

*Held*, also, that payments made from time to time by the solicitor to the annuitant, ostensibly

as of interest received by him from the fund, did not keep alive the right of action against the executors.

Judgment of *STREET, J.*, 30 O.R. 532, reversed. *Clark v. Bellamy*, 435.

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## EXEMPTIONS.

*See* ASSESSMENT AND TAXES, 2.

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## FIRE.

*See* EVIDENCE.

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## FIRE INSURANCE.

*See* INSURANCE.

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## FLOOD.

*See* WATER AND WATER-COURSES.

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## FOREIGN JUDGMENT.

*See* JUDGMENT.

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## FOREMAN.

*See Kelly v. Davidson*, 657.

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## FORFEITURE.

*See* INSURANCE, 2.

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## FORGERY.

*See* BILLS OF EXCHANGE.

**FRAUD.**

*Undue Influence—Husband and Wife.*—*Held*, upon the evidence in this case, affirming the judgment of a Divisional Court, that the transfer of property in question was executed by the husband under the undue influence and coercion of the wife and without independent advice, and was rightly set aside. *Hopkins v. Hopkins*, 658.

See BANKRUPTCY AND INSOLVENCY—EXECUTORS AND ADMINISTRATORS, 4 — LIMITATION OF ACTIONS—PARTNERSHIP.

**FRAUDS, STATUTE OF.**

See SALE OF GOODS, 1.

**FRAUDULENT CONVEYANCE.**

See *Rice v. Rice*, 121.

**GIFT.**

See *Rice v. Rice*, 121.

**HABEAS CORPUS.**

See CRIMINAL LAW, 1.

**HIGHWAY.**

*Plan—Dedication—Acceptance—Municipal Corporations.*—The owners of two adjoining lots agreed between themselves to give twenty feet of each lot

to form a street, and a plan of sub-division of the lots shewing a street of this width was filed by them, the consent of the municipality being given by resolution. The line fence was then taken down and one owner fenced his land so as to leave twenty feet of the lot open to the public; but the other fenced his so as to leave forty feet. Without any by-law or further resolution the municipality did some grading on the sixty feet, and the sixty feet were used by the public for the purpose of a highway:—

*Held*, that the giving of forty feet by the one owner did not relieve the other owner from his obligation to give twenty feet, and that he could not, after its acceptance by the expenditure of public money upon it and its use by the public, retract the dedication of the twenty foot strip.

Judgment of *BOYD, C.*, 31 O.R. 499, affirmed. *Pedlow v. Town of Renfrew*, 611.

See MUNICIPAL CORPORATIONS, 2, 4.—NUISANCE.

**HOUSE OF ILL FAME.**

See CRIMINAL LAW, 1.

**HUSBAND AND WIFE.**

*Criminal Conversation—Damages—Statute of Limitations.*—Criminal conversation is a continuing wrong, and

where the wife is enticed away more than six years before, but the criminal conversation continues down to the time of the bringing of the action, the husband may recover such damages as he has sustained within the period of six years next before the bringing of the action; recovery in respect of the enticing away and of anything else which happened prior to the six years being barred by the Statute of Limitations.

Judgment of MEREDITH, C.J., affirmed, ARMOUR, C.J.O., dissenting. *Bailey v. King*, 703.

See *Rice v. Rice*, 121.—DOWER.  
—FRAUD.

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### ICE.

See MUNICIPAL CORPORATIONS, 4.

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### INCOME.

See *Rice v. Rice*, 121.

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### INDEMNITY.

See EXECUTORS AND ADMINISTRATORS, 3.

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### INDIAN ACT.

See CRIMINAL LAW, 2.

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### INJUNCTION.

See CONTRACT, 3.—MUNICIPAL CORPORATIONS, 2.

## INSURANCE.

1. *Fire Insurance—Co-insurance Condition—R.S.O. ch. 203, sec. 171.*—Where the premium is reduced in consideration of the insertion in a policy of fire insurance, in the manner prescribed by the Ontario Insurance Act, R.S.O. ch. 203, sec. 169, of the condition commonly known as the “co-insurance condition,” that condition is *prima facie* valid and should not be held to be “not just and reasonable” within the meaning of sec. 171 of the Act, without evidence to that effect. BURTON, C.J.O., and MOSS, J.A., dissenting.

Judgment of MEREDITH, C.J., 29 O.R. 695, affirmed. *Eckardt v. Lancashire Insurance Company*, 373.

2. *Life Insurance—Benevolent Society—Beneficiary Certificate—Forfeiture—Non-Payment of Dues—Rules—Conditions—60 Vict. ch. 36, sec. 144 (O.)*—The defendants were an unincorporated union or society of workmen of a particular class, having their head office in a foreign country, with unincorporated branches or lodges in this Province:—

*Held*, that beneficiary certificates issued by them to members, entitling members or their representatives, upon payment of certain assessments, and compliance with certain conditions, to certain pecuniary benefits, were not subject to the pro-

visions of sec. 144 of the Ontario Insurance Act, 60 Vict. ch. 36.

*Held*, also, that even if the Act did apply, a beneficiary certificate not containing an absolute contract to pay any sum but stating merely that upon compliance with the conditions, and upon payment of the assessments, directed by the constitution, the sum authorized by the constitution would be paid, and that any default would render the certificate void, was not within the section, and that the conditions of the constitution must be read into it in determining its validity.

Judgment of ARMOUR, C.J., reversed. *Wintemute v. Brotherhood of Railroad Trainmen*, 524.

3. *Life Insurance — Policy Inconsistent with Application — Repayment of Premiums — Laches.*]—The plaintiff applied to the defendants for insurance at a fixed annual premium for life, but the policy sent to him contained a provision that the premium might be increased. The plaintiff did not read the policy, and, pursuant to notices from the defendants, paid them seven annual premiums at the original rate. In the eighth year the defendants demanded a larger premium:—

*Held*, that the policy, not being in accordance with the application, was a mere counter-proposal, and that there was no contract; that the plaintiff was

under no obligation to read the policy, which he was entitled to assume, in the absence of anything done by the company to call his attention to the provision in question, to be in accordance with the application; that he was, therefore, not barred by acquiescence or delay, and that he was entitled to repayment of the premiums with interest.

Judgment of ARMOUR, C.J., affirmed, MACLENNAN, J.A., dissenting. *Mowat v. Provident Savings Life Assurance Society*, 675.

See MORTGAGE.

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## INTEREST.

See MUNICIPAL CORPORATIONS, 1—WILL, 4.

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## JOINTURE.

See DOWER.

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## JUDGMENT.

*Foreign Judgment — Action in Ontario — Want of Notice of Foreign Action — Limitation of Actions — Statement of Claim — Writ of Summons — “Absence Beyond Seas” — Foreigner.*]—A creditor who has obtained judgment in a foreign country for the amount of his debt, may, if entitled to sue at all in this Province, sue either upon the foreign judgment or upon the original consideration.



An action upon a foreign judgment must fail if it be proved that the judgment has been obtained without notice to the defendant, actual or constructive.

By the endorsement of his writ the plaintiff claimed upon the foreign judgment only, but in his statement of claim he set up an alternative claim upon the original consideration, a promissory note:—

*Held*, that it was too late to object to this at the trial, and that as the period of limitation upon the note had not expired at the time of the issue of the writ the plaintiff was entitled to recover, although that period had expired before the filing and delivery of the statement of claim.

*Held*, also, that even if the action were treated as having been brought at the time of the filing and delivery of the statement of claim, the defence of the statute of limitations was of no avail, because the statute began to run in favour of the defendant, a foreigner, only when he came within the Province, a short time before the issue of the writ in this Province.

Judgment of ARMOUR, C.J., affirmed. *Bugbee v. Clergue*, 96.

See PRINCIPAL AND SURETY.

## JURY.

See TRIAL.

## LACHES.

See INSURANCE, 3.

## LANDLORD AND TENANT.

1. *Lease—Renewal—Option—Mortgage—Redemption.*]—

Under a covenant in a lease that the lessors would, at the expiration of the term thereby granted, grant another lease, “provided the said lessee . . . should desire to take a further lease of said premises,” no notice or demand by the lessee is necessary. The existence in fact of a desire for the further lease is all that is essential, and that desire may be indicated by conduct and circumstances.

A lease of land, subject to two mortgages, contained a covenant by the lessor and the second mortgagee with the lessee, that the lessee might, if he desired to do so, redeem the first mortgage, and that in that case the sum paid for redemption should be a first charge on the land:—

*Held*, that the second mortgagee’s right to redeem the first mortgage, after its acquisition by the lessee, was not taken away.

Judgment of ROSE, J., affirmed. *Brewer v. Conger*, 10.

2. *Agreement for Lease—Covenant to Pay Taxes—Evidence—Judicial Discretion.*]—

Upon a reference to settle the form of a lease, under a contract by a municipal corporation to

demise land owned by it to a railway company for a long term of years with perpetual right of renewal, evidence of surrounding circumstances and the practice and usage of conveyancers is admissible to enable the Referee to decide whether the lease should contain a covenant by the lessee to pay municipal taxes.

Judgment of ARMOUR, C.J., affirmed.

Upon such a reference the Referee is entitled to rule as to the evidence to be admitted, and he should not be ordered to admit, subject to objection, all evidence which may be tendered. *In re Canadian Pacific Railway Company and City of Toronto*, 54.

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### LEGACY.

See EXECUTORS AND ADMINISTRATORS, 1.—WILL, 1, 3.

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### LETTER.

See LIEN, 2.

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### LICENSE.

See NEGLIGENCE, 1.

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### LIEN.

1. *Mechanics' Lien*—"Owner"—*R.S.O. ch. 153, sec. 2, sub-sec. 3.*—A person is not an "owner," within the meaning of sub-sec.

3 of sec. 2 of The Mechanics' Lien Act, R.S.O. ch. 153, and as such liable in mechanics' lien proceedings for work done or materials placed upon land in which he has an interest, unless there is something in the nature of a direct dealing between the contractor and the person whose interest is sought to be charged. Mere knowledge of, or consent to, the work being done or the materials being supplied, is not enough; there must be a request, either express, or by implication from circumstances, to give rise to the lien.

Judgment of McDougall, Co. J., reversed. *Gearing v. Robinson*, 364.

2. *Mechanics' Lien*—"Notice in writing of such lien"—*Letter*—*R.S.O. ch. 153, s. 11, sub-sec. 2.*—A letter to the owner from sub-contractors furnishing materials, asking him when making a payment to the contractor for the building in question to "see that a cheque for at least \$400 is made payable to us on account of brick delivered, as our account is considerably over \$700, and we shall be obliged to register a lien if a payment is not made to-day" is sufficient "notice in writing" of a lien under the Mechanics' Lien Act, R.S.O. ch. 153, sec. 11, sub-sec. 2.

Judgment of a Divisional Court, 32 O.R. 27, affirmed. *Craig v. Cromwell*, 585.

See MERGER.—MORTGAGE.

**LIFE INSURANCE.***See* INSURANCE.**LIMITATION OF ACTIONS.**

*Sale of Goods—Warranty—Fraud.*—The defendant, who was a nurseryman, sold to the plaintiff a number of peach trees, stating in the sale agreement that they were “No. 1 peaches, warranted true to name”:—

*Held*, that this was merely a warranty that the trees were of the varieties contracted for; that the trees not being of the varieties contracted for, the warranty was broken at the time of the delivery; and that in the absence of fraud an action for damages for its breach brought more than six years after the delivery was barred, although, until the trees came into bearing between three and four years before the action, it was impossible to tell that they were not of the varieties contracted for.

Judgment of ROBERTSON, J., reversed. *Bogardus v. Wellington*, 530.

*See* EXECUTORS AND ADMINISTRATORS, 1, 2, 4—HUSBAND AND WIFE—JUDGMENT.

**LOCAL MASTER.**

*Resignation—Concurrent Appointments.*—While an appeal from his report was pending,

a local master of the Supreme Court sent a letter of resignation to the Attorney-General's Department, and, without any acceptance of this resignation, a commission was issued appointing another gentleman “a local master” for the county in question. Subsequently the appeal was allowed and the report was referred back to “the master” for the county:—

*Held*, that there could not be two local masters; that the action of the Executive was equivalent to an acceptance of the resignation; and that the reference must proceed before the new incumbent of the office.

Judgment of a Divisional Court affirmed. *In re Glen, Fleming v. Curry*, 144.

**MANUFACTURING CONDITION.***See* CROWN.**MARKET.***See* MUNICIPAL CORPORATIONS, 3.**MASTER AND SERVANT.**

1. *Negligence—Damages—Death of Child—Railway—Want of Lock at Switch.*—The omission to have a lock at a railway switch not otherwise securely guarded, situate near a much travelled highway, is such negligence as to make those having control of the railway liable in damages for the death

of their servants resulting from the switch becoming misplaced.

In an action by a parent to recover damages for the death of his child there need not be evidence of pecuniary advantage derived from the deceased; it is sufficient if there is evidence to justify the conclusion that there is a reasonable expectation of pecuniary benefit to the parent in the future, capable of being estimated.

Judgment of ROBERTSON, J., affirmed. *Rombough v. Balch and Peppard and New York and Ottawa Railway Company*, 32; *Green v. New York and Ottawa Railway Company and Balch and Peppard*, 32.

2. *Negligence — Street Railway—Motorman — Person in Charge or Control—Workmen's Compensation for Injuries Act—R.S.O. ch. 160, sec. 3, sub-sec. 5.*]—The motorman of a car running on an electric system is a "person who has the charge or control" thereof within the meaning of sub-sec. 5 of sec. 3 of the Workmen's Compensation for Injuries Act, R.S.O. ch. 160, and his employers are liable in damages to a fellow servant for injuries sustained while in discharge of his duty, owing to the motorman's negligence in passing too close to a waggon which is moving out of the way of the car.

Judgment of FALCONBRIDGE, J., affirmed. *Snell v. Toronto Railway Co.*, 151.

3. *Negligence — Dangerous Process—Want of Warning.*]—

The plaintiff while employed in removing the cut pieces from a pair of metal-cutting shears worked by steam power was struck by a flying piece of metal and severely injured. The machine was perfect of its kind and it was not shewn that a screen or guard could have been used, and the plaintiff was aware that there was danger. The danger when steel was being cut was greater than when iron was being cut, and the accident happened when steel was being cut:—

*Held*, that there should have been some system of giving warning when steel was about to be cut, and that this means of reducing the possible danger not having been adopted the defendants were liable in damages as at common law.

*Held*, also, *per* MACLENNAN, J.A., that as the foreman had been in the habit of warning the workmen when steel was to be cut and had neglected to do so on the occasion in question there was liability under the Workmen's Compensation for Injuries Act.

Judgment of ARMOUR, C.J., affirmed. *Choate v. Ontario Rolling Mill Co., Limited*, 155.

4. *Workmen's Compensation for Injuries Act — Defect in Machinery—Want of Notice of Accident—R.S.O. ch. 160, secs. 3 (1), 13, 14.*]—A machine per-



fect in itself is, if applied to some purpose for which it is unfitted, defective within the meaning of sec. 3 (1) of the Workmen's Compensation for Injuries Act, R.S.O. ch. 160.

To state in the defence that notice of the accident has not been given, and that the defendants intend to rely on that defence, is not sufficient. Formal notice of the objection must be given in accordance with the provisions of sec. 14.

*Cavanagh v. Park* (1896), 23 A.R. 715, applied.

Owing to changes in legislation, *Hamilton v. Groesbeck* (1890), 19 O.R. 76, declared to be no longer an authority.

Judgment of FALCONBRIDGE, J., affirmed. *Wilson v. Owen Sound Portland Cement Company, Limited*, 328.

5. *Parent and Child—Negligence.*]—The doctrine of the liability of a master for his servant's negligence applies in the case of the implied relationship of master and servant sometimes existing between parent and child, but as in the case of master and servant so in that of parent and child there is no liability if at the time the negligent act is committed the child is engaged in his own affairs and not on the parent's behalf.

The father of a lad of twenty, living at home, was held not liable therefore for an accident caused by the lad's negligence

while driving, with the father's implied permission, the father's horse and carriage home from a shop to which the lad had gone to purchase, with money earned by himself, articles of clothing for himself.

Judgment of ARMOUR, C.J., reversed. *File v. Unger*, 468.

6. *Negligence—Common Employment—Workmen's Compensation for Injuries Act—Superintendence—Defect in Ways.*]—The plaintiff was a labourer employed by the defendants to carry mortar to masons, also employed by them, who were building a wall on the defendants' land. The work was being done under the superintendence of a foreman, who, after the wall had been built, directed the plaintiff and one mason to do the tuck-pointing next day. In order to enable the plaintiff to take the mortar to the mason at the foot of the outer face of the wall the mason and the plaintiff made a gangway, of planks which had been used in the scaffolding, from the top of the wall to an adjacent building and thence to the ground, and while the plaintiff was walking on the gangway with a load of mortar an insecurely fastened plank gave way and he was injured:—

*Held*, that the defendants were not liable at common law, the mason and the plaintiff being fellow workmen exercising their own judgment as to the proper

means of accomplishing their object, and the planks being strong and sufficient for the purpose required if properly fastened.

*Held*, also, that there was no liability under the Workmen's Compensation for Injuries Act, the mason not being a person to whose orders the plaintiff, in respect of the mode of carrying the mortar, was bound to conform, and the gangway not being a "way" within the meaning of the Act, or constructed by a person having, in regard to it, superintendence entrusted to him.

Judgment of a Divisional Court reversed. *Ferguson v. Galt Public School Board*, 480.

*See Kelly v. Davidson*, 657.  
—NEGLIGENCE, 1.

### MECHANICS' LIEN.

*See* LIEN. — PRINCIPAL AND SURETY.

### MERGER.

*Equitable Right to a Charge* — *Subsequent Acquisition of the Fee* — R.S.O. ch. 121, secs. 8, 9, 10.] — In taking the accounts under the judgment reported 27 O.R. 511, and 24 A.R. 543, it was held that the defendant had no right to an equitable charge, in priority to the plaintiff's claim, for sums paid by him to prior encumbrancers before the conveyance of the land to him,

his potential equity not bringing him within secs. 8, 9, and 10, of R.S.O. ch. 121, and there being no evidence of intention to preserve the right to the equitable charge.

Judgment of ROBERTSON, J., affirmed. *Armstrong v. Lye*, 287.

### MINERAL RIGHTS.

*See* CONTRACT, 1.

### MORTGAGE.

*Machinery* — *Vendor's Lien* — *Priorities* — *Insurance* — *Subrogation*.] — Under a contract with the owner of a mill and machinery which was subject to three mortgages (the second and third in favour of the same mortgagees), each containing a covenant to insure, the plaintiffs took out the machinery replacing it with new machinery, reserving a lien for the balance of the price, the lien agreement providing that the mill-owner should insure the machinery for the plaintiffs' benefit. Before any further insurance was effected the mill and machinery were destroyed by fire:—

*Held*, upon the evidence, MACLENNAN, J.A., dissenting, that the second mortgagees had consented to the purchase of the new machinery upon the terms specified, and, as a result of that finding, that the plaintiffs were entitled, subject to the first mortgagee's claim, to payment

of the insurance money on the machinery and to be subrogated to the first mortgagee's rights against the land to the extent to which that insurance money was exhausted by him.

Judgment of MEREDITH, C.J., 31 O.R. 142, affirmed. *Goldie v. Bank of Hamilton*, 619.

See ESTATE—EXECUTORS AND ADMINISTRATORS, 3—LANDLORD AND TENANT, 1.

### MOTORMAN.

See MASTER AND SERVANT, 2.

### MUNICIPAL CORPORATIONS.

1. *Waterworks Company—Arbitration and Award—Payment into Court—Interest.*—Where a municipal corporation taking over the works of a waterworks company under the statutory arbitration procedure wishes to take advantage of the provisions of secs. 445 and 446 of the Municipal Act, it must pay into Court the amount awarded with interest to the date of payment in, and six months' interest in advance.

Judgment of STREET, J., 30 O.R. 81, affirmed. *In re Town of Cornwall and Cornwall Waterworks Company*, 48.

2. *Highways—Obstruction—By-law—Injunction.*—In an action to restrain the defendants from enforcing a by-law to compel the plaintiff to remove a

verandah projecting some distance over one of the streets of the town, it was held, on the evidence, that the verandah had been built after the street had been dedicated and laid out, and that it was therefore an unlawful obstruction; but as it had been in existence for a great many years and as no special necessity for its removal was made out, the Court refused to grant the defendants a mandatory injunction against the plaintiff for its removal, leaving them to enforce their by-law in such way as they should be advised.

Judgment of ROSE, J., varied. *Caldwell v. Town of Galt*, 162.

3. *Market — Auctioneer — “Regulating and Governing”*—R.S.O. ch. 223, secs. 580, 583 (2).—Neither under sec. 580, nor under sec. 583 (2), of the Municipal Act, R.S.O. ch. 223, can the municipal council of a city prohibit an auctioneer from carrying on his business in the public markets of the city in respect of any commodities which may properly be sold there.

Judgment of a Divisional Court, 30 O.R. 7, affirmed. *Bollander v. City of Ottawa*, 335.

4. *Highways—Damages—Ice—Negligence*—“Gross Negligence”—R.S.O. ch. 223, s. 606 (2).—“Gross negligence” in section 606 (2) of the Municipal Act, R.S.O. ch. 223, means at



the least "great negligence," and when it is attempted to make a municipal corporation responsible in damages under that sub-section for an accident caused by ice on a sidewalk, it must be shewn that the sidewalk was allowed to remain in a dangerous condition for an unreasonable time.

If the sidewalk has been constructed in accordance with the plans of competent engineers, and is in good repair, the possibility of an improved or less dangerous plan of construction is not an element to be considered in deciding the question of the municipality's gross negligence.

Where there was a sudden change in temperature about six in the morning and ice then formed on the sidewalk in question, it was held that the municipality, in the absence of actual notice of its dangerous condition, were not liable in damages for an accident which happened about eleven o'clock on the same morning.

Judgment of FALCONBRIDGE, J., reversed. *Ince v. City of Toronto*, 410.

5. *Board of Commissioners—Contract—Breach—Statutory Restrictions—Evasion of Statute.*—The waterworks system of the City of Windsor is, by 37 Vict. ch. 79 (O.), placed under the management of a Board of Commissioners who

are authorized to collect the revenue, paying to the city any surplus over expenditure for maintenance, and to initiate works for the improvement of the system, the necessary funds in that event to be supplied by the city. The total expenditure is limited to \$300,000, to be provided from time to time by by-law of the Council, and not more than \$20,000 to be expended in any one year without the assent of the ratepayers. A majority of the Commissioners wished to make certain improvements, but on finding that the cost would be over \$40,000, decided to carry out at the time only one-half the proposed scheme, and they entered into a contract with the plaintiffs to do work of the value of \$20,000. No by-law had been passed by the Council, and at the time more than \$280,000 had been expended by the city for waterworks purposes, and the plaintiffs knew these facts. After a small portion of the work had been done a ratepayer threatened litigation, and the Commissioners instructed their engineer not to issue a progress certificate, and the plaintiffs brought this action to recover the value of the work done:—

*Held*, that the Commissioners had in good faith divided the work; that there was, therefore, no illegal evasion of the statutory restrictions, and that the contract was not invalid on this ground.



But held also that the Commissioners were mere statutory agents of the city, and that as there was no by-law of the Council, and the statutory limit of expenditure was to be exceeded, the contract was not binding.

Judgment of BOYD, C., reversed. *McDougall v. Windsor Water Commissioners*, 566.

See CONTRACT, 2.—DITCHES AND WATERCOURSES ACT.—HIGHWAY.

## NEGLIGENCE.

1. *License—Master and Servant—Railways—Damages—New Trial.*—The plaintiff's son was given leave by a yardmaster of the defendants to learn in the railway yard the duties of car-checker, with the expectation that if he became competent he would be taken into the employment of the defendants in that capacity, and he was free to devote as much or as little time to acquiring the necessary knowledge as he saw fit. While he was in the railway yard a few days after this permission had been given he was killed by an engine of the defendants which was running through the railway yard without the bell being rung though the rules of the defendants required this to be done:—

*Held*, that the deceased was a licensee and not a trespasser;

that the defendants were bound to exercise reasonable care for his protection; and that the omission to give the warning was negligence which made them liable in damages for his death.

Judgment of BOYD, C., affirmed.

The Court being of opinion, however, that damages of \$3000 allowed by the jury were excessive, ordered that there should be a new trial unless the plaintiff should consent to accept \$1500. *Collier v. Michigan Central Railway Company*, 630

### 2. *Evidence—Onus of Proof.*]

—In an action to recover damages for death caused by alleged negligence, the onus is on the plaintiff to prove not only that the defendant was guilty of actionable negligence, but also, either directly or by reasonable inference, that such negligence was the cause of the death.

Where, therefore, a man employed on the defendant's tug was drowned, and it was shewn that wood was piled upon the tug's deck in such a way as to make it dangerous to pass along the deck, but it was also shewn that there was a safe passageway on a scow lashed to the tug and there was no evidence whatever as to the cause of the accident, the action was dismissed.

Judgment of BOYD, C., reversed. *Young v. Owen Sound Dredge Company*, 649.

See *Kelly v. Davidson*, 657—

EVIDENCE—EXECUTORS AND AD

MINISTRATORS, 4—MASTER AND SERVANT — MUNICIPAL CORPORATIONS, 4 — STREET RAILWAYS.

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### NEW TRIAL.

See NEGLIGENCE, 1.

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### NOTICE.

See EXECUTORS AND ADMINISTRATORS, 2—MASTER AND SERVANT, 4.

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### NUISANCE.

*Highway — Obstruction — Continuing Nuisance Created by Another.*]—The owner of a house abutting on a highway placed without authority a trap-door in the sidewalk in order to obtain an entrance to his cellar, the hinges of the trap-door projecting about an inch above the sidewalk. The defendant obtained title from this owner and continued to use the trap-door, and the plaintiff, while lawfully using the highway, stumbled against the hinges and was hurt:

*Held*, that the defendant could not be held to be continuing the nuisance, as she had no title to the highway, and no right, strictly speaking, to remove the trap-door constructed by another, and that, as the accident was not caused during or by her user of the trap-door, she was not liable.

Judgment of MEREDITH, C.J., reversed, LISTER, J.A., dissenting. *Ewing v. Hewitt*, 296.

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### OATH.

See DRAINAGE, 3.

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### OBSTRUCTION.

See NUISANCE.

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### ONUS OF PROOF.

See NEGLIGENCE, 2.

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### OPTION.

See LANDLORD AND TENANT, 1.

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### PARENT AND CHILD.

See MASTER AND SERVANT, 1, 5.

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### PARTNERSHIP.

*Purchase of Partner's Interest by Co-Partners—Errors in Statements—Fraud.*]—In order to avoid a dissolution of partnership and a winding up of the business, the interest of a partner in the partnership assets was purchased by his co-partners for an amount equal to the profits standing at his credit, his salary to the time of the purchase, and a percentage of his capital as shewn in the last yearly balance sheet, which was based upon statements prepared

under the supervision of this partner. More than two months after the transaction, the plaintiff's brought this action, alleging that part of the stock-in-trade had been over-valued in the statements and claiming repayment of part of the purchase money:—

*Held*, upon the evidence, that the purchase price was arrived at as a compromise, and not as an arbitrary proportion of definite items; but that, apart from this, as the statements had been prepared in good faith and in accordance with the uniform usage of the business, the defendant was not liable.

Judgment of ARMOUR, C.J., reversed. *Stroud v. Wiley*, 516.

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### PAYMENT.

*See* MUNICIPAL CORPORATIONS, 1 — PRINCIPAL AND SURETY.

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### PETITION OF RIGHT.

*See* CROWN.

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### PLAN.

*See* HIGHWAY.

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### PLEADING.

*See* JUDGMENT.

### PRACTICE.

*See* CROWN — JUDGMENT — PRINCIPAL AND SURETY—TRIAL.

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### PREMIUMS.

*See* INSURANCE, 3.

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### PRESCRIPTION.

*Right of Way—Railways—Crossing.*]—When a line of railway severs a farm, and no crossing is provided by the company, a right of way across the line may be acquired by the owner of the farm by prescription.

A farm crossing, provided by a railway company, may be used by any person who, after the severance, becomes the owner of portions of the farm on both sides of the line of railway, and has a right of access to the crossing.

A right of way may be acquired, although the dominant tenement is not contiguous to the servient tenement.

Judgment of BOYD, C., affirmed. *Guthrie v. Canadian Pacific R. W. Co.*, 64.

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### PRESIDENT.

*See* COMPANY, 2.

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### PRIORITIES.

*See* MORTGAGE.

**PUBLIC MORALS.**

*See* CRIMINAL LAW, 1.

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**PRINCIPAL AND SURETY.**

*Application of Payments—Mechanics' Lien—Practice—Judgment—Declaration of Right.*]—The plaintiff endorsed a note in the defendants' favour as security for part of a larger debt due to them for work done on their debtor's property. The note was discounted by the defendants and was dishonoured, and the holders obtained a judgment against the plaintiff which remained unpaid. Subsequently the defendants received in mechanics' lien proceedings a dividend of eighty-one cents on the dollar on their whole debt, including the portion secured by the note:—

*Held*, that they were not bound to apply the dividend first in satisfaction of the secured portion of their debt nor entitled to apply it first in satisfaction of the unsecured portion, but were bound to apply it *pro rata* on each part of the debt.

*Held*, also, that the plaintiff was entitled to a declaration of right in this respect, although he had paid nothing on the judgment.

Judgment of STREET, J., affirmed. *Hood v. Coleman Planing Mill and Lumber Company*, 203.

**RAILWAY.**

*See* DITCHES AND WATER-COURSES ACT — MASTER AND SERVANT — NEGLIGENCE, 1 — PRESCRIPTION — STREET RAILWAY.

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**REDEMPTION.**

*See* LANDLORD AND TENANT, 1.

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**RELIGIOUS INSTITUTIONS ACT.**

*See* TRUST.

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**RENEWAL.**

*See* LANDLORD AND TENANT, 1.

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**RESERVE FUND.**

*See* COMPANY, 2.

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**RESIGNATION.**

*See* CONTRACT, 2 — LOCAL MASTER.

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**RESTRAINT OF TRADE.**

*See* CONTRACT, 3.

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**RIPARIAN RIGHTS.**

*See* WATER AND WATER-COURSES, 1.

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**SALARIES.**

*See* COMPANY, 2.



**SALE OF GOODS.**

1. *Statute of Frauds—Delivery—Acceptance.*—The defendants agreed orally to buy from the plaintiff ten thousand bushels of No. 2 Red Wheat, at \$1.12 per bushel, to be delivered f.o.b. a vessel to be provided by the defendants, who were to pay freight and insurance, and delivery was to be made to them on payment of a sight draft for the price. The captain of the vessel gave the plaintiff a bill of lading describing him as the consignor, and in it, under the heading "consignees" was written "Order of Bank of Montreal, advise Melady & McNairn (defendants)." A draft for the price, drawn by the plaintiff upon the defendants, was attached to the bill of lading and discounted, but the defendants refused to accept this draft:—

*Held*, that there was, upon these facts, no final appropriation of the wheat or delivery thereof to the defendants, and that the property therein would not pass to them until acceptance of the draft, or payment or tender of the price.

*Held*, also, that neither the shipment in the vessel provided by the defendants, nor the taking by the defendants of samples of the cargo for inspection, constituted an acceptance within the statute.

Judgment of STREET, J., affirmed. *Scott v. Melady*, 193.

2. *Want of title—Damages.*—The purchaser of a chattel is entitled to recover from the vendor upon failure of title, the value of the chattel, and not merely the amount paid by him to the vendor.

Judgment of ROBERTSON, J., reversed in part. *Confederation Life Association v. Labatt*, 321.

See CONTRACT, 4.—LIMITATION OF ACTIONS.

**SEPARATION DEED.**

See DOWER.

**SETTLEMENT.**

*Contingent or Vested Estate.*—*Held*, affirming the judgment of ROBERTSON, J., 30 O.R. 517, that under the settlement in question the child who died before the period for conveying took a vested interest. *Lazier v. Robertson*, 114.

**SHARES.**

See COMPANY, 1.

**STATUTE.**

See MUNICIPAL CORPORATIONS, 5.

**STATUTES.**

27 Hen. VIII. ch. 10, sec. 7.]—See DOWER.

R.S.C. ch. 119, secs. 27, 48, 55.]—See COMPANY.

55-56 Vict. ch. 29, sec. 511 (D.)—*See* CRIMINAL LAW, 3.

55-56 Vict. ch. 29, sec. 889 (D.)—*See* CRIMINAL LAW, 2.

R.S.O. ch. 120, sec. 1.]—*See* CRIMINAL LAW, 3.

R.S.O. ch. 121, secs. 8, 9, 10.]—*See* MERGER.

R.S.O. ch. 129, sec. 32.]—*See* EXECUTORS AND ADMINISTRATORS, 2, 4.

R.S.O. ch. 129, sec. 38.]—*See* EXECUTORS AND ADMINISTRATORS, 2.

R.S.O. ch. 153, sec. 2, sub-sec. 3.]—*See* LIEN, 1.

R.S.O. ch. 153, sec. 11 (2).]—*See* LIEN, 2.

R.S.O. ch. 160, secs. 3 (1), 13, 14.]—*See* MASTER AND SERVANT, 4.

R.S.O. ch. 160, sec. 3, sub-sec. 5.]—*See* MASTER AND SERVANT, 2.

R.S.O. ch. 203, sec. 171.]—*See* INSURANCE, 1.

R.S.O. ch. 223, sec. 80 (1).]—*See* CONTRACT, 2.

R.S.O. ch. 223, secs. 445, 446.]—*See* MUNICIPAL CORPORATIONS, 1.

R.S.O. ch. 223, secs. 580, 583 (2).]—*See* MUNICIPAL CORPORATIONS, 3.

R.S.O. ch. 223, sec. 606 (2).]—*See* MUNICIPAL CORPORATIONS, 4.

R.S.O. ch. 224, sec. 7 (5).]—*See* ASSESSMENT AND TAXES, 2.

R.S.O. ch. 224, sec. 135, sub-sec. 4 (b).]—*See* ASSESSMENT AND TAXES, 3.

R.S.O. ch. 226, sec. 3, sub-sec. 3.]—*See* DRAINAGE, 2.

R.S.O. ch. 226, secs. 5, 75.]—*See* DRAINAGE, 3.

R.S.O. ch. 226, secs. 89, 90.]—*See* DRAINAGE, 1.

R.S.O. ch. 307.]—*See* TRUST.

60 Vict. ch. 36, sec. 144 (O.)]—*See* INSURANCE, 2.

61 Vict. ch. 19 (O.)]—*See* CROWN.

62 Vict. ch. 15 (O.)]—*See* EXECUTORS AND ADMINISTRATORS, 2.

## STREET RAILWAYS.

*Negligence—Frightening Horses.*]—The plaintiff, who was

driving a carriage with a pair of horses, stopped near a railway crossing to allow a train to pass. An electric car of the defendants coming in the opposite direction stopped on the other side of the railway crossing for the same reason. The plaintiff's horses were frightened by the train and became restive, and after the train passed the plaintiff waved his hand to the motorman of the electric car as a signal, as he contended, not to start the car. The horses were apparently under control and the motorman started the car, when the horses became frightened again and ran away:—

*Held*, that the plaintiff's signal was ambiguous, and as there was apparently no danger, the motorman could not be said to have been guilty of negligence, and therefore that the defendants were not liable.

Judgment of a Divisional Court, 31 O.R. 309, reversed. *Myers v. Brantford Street Railway*, 513.

*See* ASSESSMENT AND TAXES, 1—MASTER AND SERVANT, 2.

## SUBROGATION.

*See* MORTGAGE.

## SUMMARY TRIAL.

*See* CRIMINAL LAW, 1.

## TENANTS IN COMMON.

*See* CONVERSION.

**TIMBER LICENSES.**

*See* CROWN.

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**TITLE.**

*See* SALE OF GOODS, 2.

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**TRANSFER.**

*See* COMPANY, 1.

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**TRESPASS.**

*See* CRIMINAL LAW, 3.

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**TRIAL.**

*Jury—Failure to Agree—Dismissal of Action — Rule 780.*]—When in an action tried with a jury the presiding judge holds that there is evidence to submit to the jury and refuses a nonsuit, he cannot upon the jury disagreeing, himself decide under Rule 780 in the defendant's favour, upon his own view of the evidence.

Judgment of STREET, J., 30 O.R. 635, affirmed. *Floer v. Michigan Central R. W. Co.*, 122.

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**TRUST.**

*Church—Possession — Religious Institutions Act—R. S. O. ch. 307.*]—Land was conveyed to certain persons in trust for a religious body called The United Brethren in Christ, and a congregation was organ-

ized and a church built. Subsequently a division took place in the religious body and it was held, in *Itter v. Howe* (1896), 23 A.R. 256, that the party to which the congregation in question adhered were seceders. This congregation continued to use the church, and, some of the original trustees having died, appointed new trustees to act with the survivors, and these trustees refused to give up possession to the representatives of what had been declared to be the true body:—

*Held*, that the trustees must be treated as being trustees for the true body, who were entitled to enforce the trust and to have possession of the church, and that it was not necessary to organize another congregation and appoint new trustees for that congregation under the Religious Institutions Act.

Judgment of ARMOUR, C.J., reversed. *Brewster v. Hender-shot*, 232.

*See* EXECUTORS AND ADMINISTRATORS, 1, 2, 4.

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**UNDUE INFLUENCE.**

*See* FRAUD.

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**WARRANTY.**

*See* LIMITATION OF ACTIONS.

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**WATER AND WATERCOURSES.**

*Flood—Change in Course of Stream — Riparian Right.*]—

When, owing to an extraordinary flood, a stream suddenly changes its course and washes away part of the land of a riparian proprietor, he is entitled, at any time before a prescriptive right, or right by estoppel, to keep the stream in its new channel is acquired against him, to fill in the places washed away and to turn the stream back to its original channel.

Judgment of MACMAHON, J., affirmed. *County of York v. Rolls*, 72.

See CRIMINAL LAW, 3—  
DRAINAGE.

### WATERWORKS.

See MUNICIPAL CORPORATIONS,  
1, 5.

### WAY.

See HIGHWAY—PRESCRIPTION.

### WILL.

1. *Construction—Contingent or Vested Interest—Legacy.*—A testator devised certain property to trustees, to hold it in trust for twenty years after his decease; during that time to pay the income to his widow and children, naming them, in certain shares; and after the expiration of twenty years to sell and to divide the proceeds among his “said children” in certain shares:—

He also devised certain other property to the trustees upon trust to sell from time to time as they in the exercise of “full discretion” should think fit, and to pay the income to his widow for life, and upon her decease, to divide the corpus among his children, naming them, in certain shares:—

*Held*, affirming the judgment of MEREDITH, J., that the children took vested interests. *Kirby v. Bangs*, 17.

2. *Construction—Inconsistent Clauses—Executory Devise—Failure of Issue.*—A testator, by the third clause of his will, devised a lot of land to a son, “his heirs and assigns forever,” and in the fourth clause stated it to be “my will and desire, provided my (said) son shall have no lawful heir or children, that the above mentioned tract of land, after his death, that (the plaintiff) shall have it with all the right and title that my (said) son had to it heretofore.” By the fifth clause he gave to his wife “the use” of half the lot, “during life; after her decease my will is that the same shall belong to my (said) son, his heirs and assigns forever.” The son died after the testator without having had any children:—

*Held*, that the fifth clause removed from the operation of the third and fourth clauses one-half of the lot which vested in the son subject to the mother’s



life estate, while as to the other half the son had under the third clause an estate in fee simple subject under the fourth clause to an executory devise over in favour of the plaintiff, which, in the events which had happened, had taken effect.

Judgment of a Divisional Court, 30 O.R. 627, affirmed. *McMillan v. McMillan*, 209

3. *Construction—Legacy—Survivorship—Accruer.*—A testator gave a legacy of \$500 to each of three grandchildren, and directed “the said moneys so bequeathed to be kept invested by my executors and the same with accrued interest to be paid over to the said grandsons on their attaining their majority, and the said legacy to my said granddaughter to be paid to her with the interest accrued thereon on her attaining her majority or on her marriage, whichever event shall first happen. In case of the death of any one of my said grandchildren the bequests and legacies to them in this my will contained shall be divided among and go to the survivor or survivors of them, share and share alike.” One of the grandsons died under age and unmarried, and then the granddaughter died under age and unmarried. The other grandson attained his majority and the executor paid him the whole amount of the legacies. In an action by the personal representative of the grand-

daughter seeking payment by the executor of half of the legacy given to the grandson who died first and the accumulations thereon:—

*Held*, that the share of the deceased grandson’s legacy which accrued to the granddaughter on his death passed on her death to the surviving grandson, and that the plaintiff was not entitled to it.

Judgment of STREET, J., reversed. *Clifton v. Crawford*, 315.

4. *Construction—Annuity—Interest on Fund.*—A testator by his will directed his executors “to take as much of my estate and moneys to be put to interest as will make \$200 of interest per year, said amount of \$200 to be paid to my beloved wife . . . each and every year of her life, said \$200 to be paid by my executors to my beloved wife on the 1st day of January next after my decease, and every subsequent payment to be paid on the 1st day of January in each and every year thereafter. . . . At the death of my said wife said principal to be equally divided between my brothers.” There were specific devises of some real estate and chattels, and the residue was not sufficient to produce \$200 a year:—

*Held*, affirming the judgment of a Divisional Court, that the widow was entitled to \$200 a year, and that the *corpus* of the estate should be resorted to if

necessary for that purpose.  
*Kimball v. Cooney*, 453.

See ESTATE.

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### WORDS.

“Fair and Reasonable Supposition of Right.”]—See CRIMINAL LAW, 3.

“Gross Negligence.”]—See MUNICIPAL CORPORATIONS, 4.

“Notice in Writing of Lien.”]—See LIEN, 2.

“Owner.”]—See LIEN, 1.

“Person in Charge or Control.”]—See MASTER AND SERVANT, 2.

“Public Hospital.”]—See ASSESSMENT AND TAXES, 2.

“Regulating and Governing.”]—See MUNICIPAL CORPORATIONS, 3.

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### WORKMEN'S COMPENSATION ACT.

See *Kelly v. Davidson*, 657.  
—MASTER AND SERVANT.

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### WRIT OF SUMMONS.

See JUDGMENT.

















